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THE LEGAL NEWS

THE TOLEDO LEGAL NEWS

AND THE

OHIO LEGAL NEWS

//

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Probate Court; S. C. O., Supreme Court of Ohio.

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Toledo Legal News.

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SATURDAY, APRIL 21, 1894.

INTRODUCTION.

In presenting to the Attorneys of Ohio a weekly edition of the TOLEDO LEGAL NEWS, we are not, if we read the signs of the times aright, urging their acceptance of a publication which they have not already demanded. Nearly all members of the bar in this part of the state, and many elsewhere, appreciate the importance of having a reliable medium in securing decisions from the Courts in Toledo, and other points in this vicinity. Heretofore these decisions, though frequently of great, even national importance, have never been published regularly. Our daily edition of the LEGAL NEWS began the work first and, with the report of the news of local Courts, has served the purpose well, we have reason to think, so far as the Toledo bar is concerned. Its work has not been confined to the local field entirely, but it must be very largely so on account of the expense or subscription price which is \$10. per year. That sum is a moderate return for the information which our daily contains, but a large portion of the news is of no value to attorneys outside of Toledo.

To meet a general demand we have created the weekly, which will be furnished for \$3.00 per year, payable quarterly in advance.

Subscribers to our daily will receive the weekly without extra charge.

The purpose of the TOLEDO LEGAL NEWS; weekly Edition, may be briefly stated as follows:

A careful report of Supreme Court proceedings, together with a syllabus of decisions and in very important cases, the decision is full.

Proceedings of the United States Circuit and District Courts in Toledo.

ALL DECISIONS of the Circuit Court,

Scribner, Haynes and Bentley, J. J., Sixth Judicial District.

Notes of cases and all decisions of the Common Pleas Court, (Lemmon, Harmon and Bugsley, J. J.) of Lucas County, together with important and interesting decisions from other parts of the state.

We also have facilities for securing decisions of the Supreme Courts of New York, Illinois, Michigan and other states and when applicable to the practice here or likely to be of interest to the Ohio bar, such decisions will be published.

During sessions of the State Legislature a report of amendments and new laws will be found in our columns.

Many of these features are apparent in this issue and to those we beg to refer. As to other purposes and aims, all may be included in the assurance that our intention and desire is to furnish, so far as is possible, all the news likely to be of interest to Ohio lawyers. And in the selection of the matter, its preparation and arrangement, we employ some knowledge of a lawyers needs, which will be conscientiously utilized for their benefit.

It hardly seems necessary but we are urged, in conclusion, to call the attention of possible subscribers, to whom this issue of our paper is sent gratis, to the importance and weight of the decisions of the Courts, whose important business comes under our personal observation.

The character of the Circuit Court of this district is too well known to require our recommendation. We simply desire to repeat an assertion, generally acknowledged to be correct, that decisions of the Sixth Judicial Circuit Court, are ranked among the highest authorities in Ohio.

Our Common Pleas Court holds an equally important position in its sphere and is obliged, by the immense volume of important business, to be a most interesting source of legal news and information.

In adopting a form for the weekly edition of the LEGAL NEWS we have consulted the interests of Attorneys. Our newspaper instincts would have directed us toward a form similar to that of our daily paper, which would have afforded us a little more scope in some respects, but we appreciate the fact that it would not be convenient for filing or binding. We have adopted, therefore, the regulation pamphlet style and at the end of the year will publish an index to the volume.

Your subscription, with draft or P. O. money order for one year, six months or three months, payment in advance, should be addressed to The Toledo Legal News Co., Toledo, O.

LIEN LAW.

[Senate Bill No. 29.]

An Act to amend section 3184, as amended April 18, 1892, and sections 3188, 3193, 3194, 3195, 3197 and 3200, and to supplement section 3185, and to repeal sections 3188, 3196, 3198, 3199, 3201, 3202, 3203 and 3204.

Section 1. Be it enacted by the General Assembly of the State of Ohio, That section 3184, as amended April 18, 1892, and sections 3188, 3193, 3194, 3195, 3197 and 3200 be amended so as to read as follows:

Sec. 3184. A person who performs labor, or furnishes machinery or material for constructing, altering or repairing a boat, vessel or other water-craft, or for erecting, altering, repairing or removing a house, mill, manufactory, or any furnace or furnace material therein, or other building, appurtenance, fixture, bridge or other structure, or for the digging, drilling, plumbing, boring, operating, completing or repairing of any gas well, oil well, or any other well, or performs labor of any kind whatsoever, in altering, repairing or constructing any oil-derrick, oil-tank, oil or gas-pipe line, or furnishes tile for the drainage of any lot or land by virtue of a contract with, or at the instance of the owner thereof or his agent, trustee, contractor or subcontractor, shall have a lien to secure the payment of the same upon such boat, vessel or other water-craft, or upon such house, mill, or manufactory or other building or appurtenance, fixture, bridge or other structure, or upon such gas-well, oil-well or any other well, or upon such oil-derrick, oil-tank, oil or gas-pipe line and upon the material and machinery so furnished, and upon the interest, leasehold or otherwise, of the owner in the lot or land on which the same may stand, or to which it may be removed.

Sec. 3188. When liens are obtained on the same property by persons performing labor, or furnishing machinery or material, and by the original contractor, the lien of such contractor shall be postponed to the liens of the persons performing the labor, or furnishing machinery or material, and the latter shall have no priority among themselves.

Sec. 3193. Any subcontractor, material man, laborer or mechanic, who has performed labor or furnished material or machinery, who is performing labor or furnishing material or machinery, or who is about to perform labor or furnish material or machinery for the construction, improvement or repair of any turnpike, road improvement or other public improvements provided for in a contract between any board or officer and a principal contractor, and under a contract between any such subcontractor, material man laborer or mechanic and a principal contractor or subcontractor, may, at the time of beginning to perform such labor or furnish such material or machinery, or at any time thereafter, not to exceed ninety days from the completion of such labor or delivery of such machinery or material, file with the board or officer, or the authorized clerk or agent thereof, a sworn and itemized statement of the amount and value of such labor performed and to be performed, material or machinery furnished, containing a description of any promissory note or notes that may have been given by the principal contractor or subcontractor on account of said labor, machinery or material, or any part thereof, with all credits and set-offs thereon.

Sec. 3194. Upon receiving the notice, such board or officer, or authorized clerk, agent or attorney thereof, shall detain in his hands all subsequent payments from the

principal or subcontractor to secure such claims and the claims and estimates of other subcontractors, material men, laborers, mechanics, or persons furnishing materials to or performing labor for any contractor or subcontractor who may intervene before the next subsequent payment under the contract, or within ten days thereafter.

Sec. 3195. Such subcontractor, material man, mechanic, laborer or person so filing his statement with the board, officer or authorized clerk or agent or attorney thereof, shall, in order to notify his fellow subcontractors, material men, mechanics, laborers; and persons furnishing material at the same time, file a copy thereof with the recorder of the county where such property is situate, which if he fail to do the filing of the notice with the board, officer or authorized clerk, agent or attorney thereof, shall give him no preference over other claimants; and for filing or making any copy of such statement or certificate of the date of such filing, the recorder shall be entitled to the same fees as are provided by law for like services in regard to chattel mortgages.

Sec. 3197. The owner of property upon which a lien has been taken under the foregoing sections, may notify, in writing, the owner of the lien, or his agent or attorney, to commence suit thereof, and if he fails to commence the suit within sixty days after receiving such written notice, the lien shall be null and void; but nothing herein contained shall prevent the claim from being collected as other claims are collected by law.

Sec. 3200. In case of a dispute between the head contractor and subcontractor, or between either of them and any person entitled to a lien by virtue of this act, as to the amount of the claim or lien, and the same can not be settled between

themselves, it shall be submitted to the arbitration of three disinterested persons, one to be chosen by each of the parties, and one by the two thus chosen, and their decision, or that of any two of them, shall, in the absence of fraud or collusion, be final and conclusive on the parties.

SECTION 2. That section 3185 be and the same is hereby supplemented as follows:

Sec. 3185a. In all cases where the labor, material or machinery referred to in sections 3184 and 3185 shall be furnished by any person other than the original contractor, with such owner or his agent or trustee, the lien shall not exceed the actual value of the labor, material or machinery so furnished, and the aggregate amount of liens for which the property may be held shall not, in the absence of fraud or collusion between the owner and original contractor, exceed the amount of the price agreed upon between the owner and the original contractor for the performing of such labor and the furnishing of such material and machinery. Provided, if it shall be made to appear that the owner and contractor, for the purpose of defrauding subcontractors, material men or laborers, fixed an unreasonably low price in the original contract for any work or material for which a lien is given under section 3184, the court shall ascertain the difference between such fraudulent contract price and a fair and reasonable price therefor, and such sub-contractors, material men and laborers shall have a lien to the amount of such fair and reasonable price so ascertained.

SECTION 3. That section 3184, as amended April 18, 1892, and sections 3188, 3193, 3194, 3195, 3196, 3197, 3198, 3199, 3200, 3201; 3202, 3203 and 3204 be and the same are hereby repealed.

SECTION 4. This act shall take

effect and be in force from and after its passage.

ALEX. BOXWELL,
Speaker of the House of Representatives.

THOMAS H. MCCONICA,
President pro tem of the Senate.
Passed April 13, 1894.

NEW LAWS.

COLUMBUS, O., April 16.

The following amendments to the Revised Statutes have been made by the General Assembly during the past week:

S. B. No. 205 amends section 5301, relating to bills of exceptions. It provides that in case of the expiration or other disability the bill may be presented to any judge of the district. The provision is to apply to cases pending for allowance of a bill of exceptions.

S. B. No. 198 amends 649, defining more specifically the duties of financial officers of public institutions.

H. B. No. 156 amends 3641 by including in the list against which companies may insure "loss by theft and damage by accident." It also amends 3656 by including a provision relating to the requirements of live stock insurance companies.

H. B. No. 544 amends section 6, 307 as follows:

Sec. 6307. The guardian of any idiotic, imbecile or insane person, who has or is supposed to have a right of dower, or a contingent right of dower, in any lands or tenements, of which the husband or wife of such person was seized as an estate of inheritance, or in any land held by bond, article, or other evidence of claim, where the dower has not been assigned, shall have power to sell, compromise or adjust the same upon such terms as he shall deem for the interest for such person, and as the probate court of the county in which the guardian

was appointed shall approve; and after such approval the guardian may execute and deliver all the needful deeds, releases and agreements for the sale, compromise, or assignment of such dower, contingent right of dower.

H. B. No. 324 amends section 4, 567b by providing that a petition signed by two-thirds of owners of adjoining or adjacent lands to any such streams shall be competent, instead of all as required by the original section.

H. B. No. 309 amends section 845 by enlarging the powers of county commissioners in action brought against them or by them as follows: "And of bringing, maintaining and defending all suits, either in law or in equity, involving an injury to any public state or county road, bridge or ditch, drain or water-course established by such board in their county, and for the prevention of injury to the same, and any such board of county commissioners shall be liable in their official capacity for any damages received by reason of the negligence or carelessness of said commissioners in keeping any such road or bridge in proper repair, etc."

H. B. No. 577 supplements section 4239, relating to partition fences as follows:

Section 4239a. No person or corporation shall construct or cause to be constructed, in whole or in part, a partition fence, from barbed wire, unless the written consent of the owner or lessee for three or more years of the premises be first obtained. Whoever constructs or causes to be constructed a barbed wire partition fence without the consent contemplated in this section, shall be fined not more than one hundred dollars nor less than ten dollars.

H. B. No. 373 amends section 2, 754. The amendment makes the owner of premises who knowingly

permits the harboring of a dog or dogs responsible for the purpose of listing and taxation. The owner shall ascertain the harboring of dogs on his premises.

H. B. No. 595 is an entirely new act, and provides that township trustees shall have authority to receive by gift, devise, bequest, or otherwise, any money, securities or property in trust as a permanent fund; to be held and invested by said trustees and their successors in office. It also provides for the expenditure of the income from such investments.

H. B. No. 2495 amends section 2495 by including the words "gas posts, electric lights or other lights."

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IN OTHER STATES.

Important Decisions of the Supreme, Circuit
and Common Pleas Courts.

COMMUNICATIONS BY TELEPHONE.

The New York Law Journal of the 26th of March contains a full report of the recent decision of the Supreme Court of that State relative to communications by telephone. It was on an appeal from an order granting a motion to vacate an attachment made on the papers on which the writ was granted.

The following briefly states the facts:

"The complaint was verified by one of the attorneys for plaintiff, and said attorney also made the affidavit upon which the attachment was based, averring on information and belief the facts required to be shown by sec. 636 of the code, and giving the plaintiff himself as the source of the affiant's information and stating that the means through which affiant derived his information was a conversation by a long distance telephone, the plaintiff being in Boston and the affiant in New York. It did not appear that affiant knew and recognized the voice of the plaintiff."

The opinion, by Follett, J., after discussing the statutory provisions relative to affidavits for attachments by agents or attorneys, goes on to say:

In the case at bar the existence of the facts necessary to confer jurisdiction on the judge having been shown by affidavit, the question is, ought the judge to have been satisfied by the evidence presented? * * * *

The means through which the affiant derived his information was a conversation by a long-distance tel-

ephone, the plaintiff being in Boston and the affiant in New York.

It has been held that an attachment may be based upon facts reported to the affiant by means of a cablegram (*Richeabach vs Spethman, supea*). In the case last cited an attachment was granted and sustained on information cabled from Europe to the affiant in New York. Certainly, the means would not have been less reliable had the sender and receiver of the cablegram been able personally to have communicated with each other by telegraph and had done so. There was certainly no greater chance for error in communicating the information received by the affiant, in the case at bar, in the manner in which it was communicated, between persons interested, in arriving at the exact facts, than there would have in a communication transmitted either by telegraph or cablegram, and written out and delivered in the ordinary way.

We do not think that it will do to hold that judicial action cannot be based on information transmitted by telephone, unless, as it is suggested, the affiant swears that he knew and recognized the voice of the person with whom he communicated. Such identification is impossible in telegraphic communication, and the precaution of repeating dispatches would afford no greater security against deception than the opportunity of personal inquiry and cross-examination over the telephone. There can be no absolute rule by which the sufficiency of evidence to sustain attachments can be determined, and every case must depend largely upon its own facts and somewhat upon the nature of the action, and also between whom the question arises. In the case at bar the cause of action is a liquidated demand arising on the sale of goods. The ground for the attachment is that defendants are

non-residents of the state, two simple facts, which, as between the creditor and debtors, we think were established *prima facie* by the complaint and affidavit used on granting the writ, and that the burden was cast on the defendants, if they desired relief from the attachment, to rebut the presumption arising from those affidavits and show affirmatively either that they were not indebted or that they were not non-residents of the state. * * *

O'Brien, J., concurs.

Van Brunt, P. J., (dissenting)—I cannot concur in the conclusion of the within opinion. It proceeds upon the assumption that the attorney communicated with the plaintiff by telephone, and received from him the facts necessary to be presented to the court, upon the application for attachment. The attorney did not see the plaintiff, nor did he recognize his voice. Where, then, is there any proof that the plaintiff communicated anything? In the case of a telegram a record is made. The original dispatch is preserved and accessible, but, in the case of communication by telephone nothing is left to which any test can be applied by which the accuracy or authenticity of the alleged communication can be determined.

Editorially the Law Journal says:

"The majority of the court so carefully limit the scope of the present decision that rulings, contrary in effect, may be made, without inconsistency, in future litigations, upon slightly different facts. We believe, however, that the principle laid down is a just and expedient one, and that its application is more likely to be extended than circumscribed.

* * * * *

"The present decision simply gives legal countenance to a new outcropping of a general rule of the business world."

In a further discussion of the

opinion two cases are cited as follows:

In *Wolfe vs the Missouri Pac. Ry Co.* (97 Mo., 473), the court, per Dillon, J., said: "When a person places himself in connection with the telephone system, through an instrument in his office, he thereby invites communication in relation to his business through that channel. Conversations so held are admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be, in relation to the business there carried on. The fact that the voice at the telephone was not identified does not render the conversation inadmissible."

In *Globe Printing Co vs Stahl* (23 Mo. App., 451) it appeared that the witness did not know whose voice it was at the other end of the telephone. He did not know the defendant's voice and did not know the defendant, but he asked if it was the defendant, and the answer was "Yes." The evidence was, in a well considered opinion, held admissible.

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COMMON PLEAS COURTS OF OHIO.

The following are among the important and interesting decisions of a recent date.

HELD TO BE UNCONSTITUTIONAL.

Judge Miller, of the Court of Common Pleas of Clark county, has held the law, under which street railway managers have been indicted for failing to properly screen the street railway cars, to be unconstitutional.

We give his decision in full.

Court of Common Pleas, Clark County Ohio.

The State of Ohio plaintiff vs Samuel L. Nelson defendant. Decision on demurrer.

MILLER, J.

The following is the statute to which by the demurrers filed herein I am called upon to give construction, to-wit:

"An act requiring persons, associations and corporations owning or operating street cars to provide for the well-being of employees.

Section 1. Be it enacted by the General Assembly of the State of Ohio, that every *electric* street car other than trail cars which are attached to motor cars, shall be provided during the months of November, December, January, February and March, of each year, at the forward end with a screen constructed of glass or other material, which shall fully and completely protect the driver, or motor-man, or gripman, or other person stationed on such forward end and guiding and directing the motor power by which they are propelled, from wind and storm.

Section 2. Any person, agent, or officer of any association or corporation violating the provisions of this act, shall upon conviction, be fined in any sum not less than \$25, nor more than \$100, for each day each car belonging to and used by such person, association or corporation is directed or permitted to remain unprovided with the screen required in section one of this act."

It will be observed that the title is general as to street cars and the body of the statute special to one class only of street cars.

There are several objections urged to this statute, only three of which, however, do I find it worth while to notice.

The first is, that the legislature having conferred upon municipal corporations certain powers over the streets and highways within the limits of the corporation and also the right to grant the use of such streets and highways for street rail.

roads and to prescribe the terms of said grant, can only interfere with the same by a direct withdrawal of such authority, and that the power to so fix the said terms remains in the councils of such corporation to the exclusion of the right of the legislature to enact such a law as the one under consideration. As to this point, it is sufficient to say that the powers granted under section 3443 of the Revised Statutes can by no possibility have any reference to such provision as is set forth in this statute, being for a purpose not inconsistent with or repugnant to the powers granted in that section or in any other section of the statute. The phrase "terms and conditions" is limited to the extent and method of use of said streets and highways and the compensation which may be required for the exercise of such franchise by a street railroad company, and does not preclude the legislature from enacting such laws as it might otherwise rightfully do for the prevention of injuries arising from the running of cars upon such street railways.

Second: It is claimed that the above statute is unconstitutional for the reason, as is claimed, that being class legislation it does not operate alike upon all the members of the class to govern which the same was enacted; in other words, that while it professes in its title to be for the benefit of all persons who may be employed upon street cars, by the express terms of the statute it is limited, to such employees on electric cars, excluding from its operation such employees on horse or cable cars, thus making it appear upon the face of the statute a distinction which otherwise the Courts might not give consideration to. A large number of authorities have been cited and I have spent considerable time in examining and weighing the same as applied to the above statute.

It is plain to even a casual reader that the said statute is incongruous in its provisions, owing entirely to the introduction of one word, the word "electric;" by leaving out which we have a law applicable to all kinds of street railroads known to the people of our state, viz: horse, electric and cable cars, to the latter, two of which at least, trail cars are sometimes used, and the employees whose business it is to guide and direct the motor power, whether horse or mules, electricity or steam applied to cables, are specially designated in the words, "driver" for horses, "motorman" for electric cars, and "gripman" for cable cars.

A statute framed in that way being both in its title and in its provisions applicable to all kinds of street railroads,

would upon its face be free from the objection named for the reason that as to the subject matter of said statute, viz: the protection of such employees, street railroads are *sui generis*, and no other kind of vehicles which are now upon our streets and highways have need of the appliances like those described in said statute for the protection of employees from "wind and storm," and hence as to such subject matter they constitute the entire class.

How the word "electric" came to be inserted in that section it is not known but the question is as to the legal effect of such insertion. Does it make what was before fair and proper to be "unequal and partial legislation" as classed by Cooley in his work on Constitutional Limitations? It is claimed that a statute is not necessarily bad because of its being class legislation, but only when unequally applied as between persons of the same class. The rule laid down by Cooley is that "if the law be otherwise unobjectionable, all that can be required in these cases is that they be general in their application to the class or locality to which they apply; and they are then public in their character, and of their propriety and policy the legislature must judge." "But," he goes on to say, "a statute would not be constitutional which should prescribe a class or party for opinion's sake, or which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt."

The rule is stated somewhat differently by Justice Field in *Soon Hing vs Crawley*, Chief of Police of San Francisco, 113, U. S. 703 as follows: "The discriminations which are open to objections are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then, that the discrimination can be said to impair the equal right which all claim in the enforcement of the law." In *Van Riper vs Parsons*, 40, N. J., Law Reports, page 9, the Court say: "Interdicted local and special laws are all those that rest on a false or deficient classification; their vice is that they do not embrace all the class to which they are naturally related. They create preferences and establish inequalities: they apply to persons, things or places possessed of certain qualities or situations, and exclude from their effect other persons, things or places which are not dissimilar in this respect."

In *Froher vs People*, an Illinois case re-

ported in 31 N. E. Reports, page 400, the Court say: "Understanding our constitution as we do, it is impossible, without disregarding its provisions to sustain a statute which makes that a misdemeanor when done by persons engaged in one branch of industry, which if done by persons in another branch of industry, *in like relation and under like conditions, will be lawful.*"

Cooley on Constitutional limitation on page 301 says, by way of further statement of the rule, "Every one has a right to demand that he be governed by general rules and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free government."

The last quotation is with reference to privileges granted to, or burdens laid upon individuals, which are not awarded to or imposed upon others, but is illustrative of the general principle lying at the foundation of all class legislation, that is, quoting from *Smith vs Judge*, 17 Cal., 554, "that such laws shall bear equally in their burdens and benefits upon persons standing in the same category."

Neither is the case of *C. B. & Q. R. R. Co. vs Iowa* 94, U. S. 155 reviewing a statute providing for different classes of railroads different rates of charges, and frequently quoted in support of unlimited legislative discrimination, in conflict with the principles above stated, for Chief Justice Waite in his opinion says, "It is very clear that a uniform rate of charges for all railroad companies in the state might operate unjustly upon some," and hence that all the railroads in the state did not stand as to the subject matter of the law in the same category.

It is not necessary for me to review all the authorities cited but only enough to gather some clear apprehension of what the Courts and sound lawyers hold upon this subject; and we deduce therefrom the principle, not that there may not be class legislation, but to use the language of the Court in *Bronson vs Oberlin*, 41, Ohio State Reports, page 481, "the classification must be just and reasonable, and not arbitrary," and from the other authorities that "that those engaged in the same business shall not be subject to different restrictions," that the classification shall not be "deficient"; that it shall not "create preferences and establish inequalities;" that it shall not discriminate against those engaged in one branch of industry in favor of those engaged in another branch of industry, "in like rela-

tions and under like conditions," and that such class legislation "shall bear equally in burdens and benefits upon persons standing in the same category."

Coming to apply these principles, or rather this principle thus variously stated, to the statute under consideration, what is the result?

Counsel for the defendant claim that the Court will take judicial notice of the various kinds of street railroads and also of the character of the street cars running upon them, and of the appliance for running the same. The matters referred to are not within the range of matters ordinarily classified as subjects of judicial notice, but what is its equivalent, the Court cannot ignore, in giving construction to a statute, its own knowledge of such facts as are within the common observation and experience not only of himself but also of all other men. It will not ignore the common knowledge of men of the difference between an omnibus and a street car, and between the latter and a railroad locomotive; neither will it ignore the points of general resemblance in street cars, and whatever points of difference there may be, that all street cars have places of entrance and exit and the character of the same; that at least all horse and electric cars have upon the front end of the same a place for the driver and motorman, who respectively drive the horses or apply the electricity to the moving of the car; thus in the language of the statute guide and direct the motor power by which the car is propelled; that in so doing they are alike exposed to the weather, that they both alike, unless a screen is interposed, suffer from the storm and wind, that the pitiless rain, snow and furious blasts of winter at times render it almost impossible for men to endure the position, and that the circumstances of both require some protection

But is there any more reason for the protection of one than for the other? Counsel for the State suggest but one and that is that the electric cars move with more rapidity than horse cars and hence that the motorman may suffer more. The difference is one of degree, and not of quality, and is of so slight a character as not to bear analysis in the discussion of the question.—"If a motorman needs the protection of a screen, why should not the driver of a horse car? It is as if it being found necessary to provide a cab for the protection of an omnibus driver, a law should be enacted to provide under penalty a cab for a four horse omnibus and leave a two-horse omnibus driver unprotected on the theory that four horses would move a little

faster than two horses, and so by a more rapid motion create a stiffer breeze and thus produce a little more cold. I am not aware that it has ever been found necessary to provide a protection for engineers and firemen on railroad locomotives, for as long as I can recollect, such protection has been provided, probably voluntarily. But suppose there had been such necessity. We have had in this state in the past, three classes of steam railways, viz: broad gauge standard gauge and narrow gauge. What would have been thought of a law which general in its title to all railroads provided a cab for the protection of the engineer and fireman of a standard gauge locomotive only, or for both standard gauge and broad gauge, leaving the narrow gauge out on the sole claim that it could not make quite so fast time as the other two. The fact is, that the exposure for hours to the open air of winter is hard enough upon either motorman or driver, though there be neither rain, hail, snow or high wind, and it calls for some mitigation of the hardship. And that is what makes it difficult for me to decide this question. I am in sympathy with the law, but when the defendant challenges me by his demurrer for my opinion I must say that I cannot see any substantial reason for requiring the screen provided in this statute for the motorman of an electric car that does not apply to the driver of a horse car. Let it be observed in this connection that this is not a *vestibule* law as it is ordinarily termed—the word "*vestibule*" is not used, but simply the word "screen," and not any particular form of screen is prescribed, so that the *character* of the screen is not in controversy, and the form of the screen can be varied to some extent to suit the different kind of car upon which the same may be used. So that the question of the practicability of a *vestibule* is not involved. They are "in the same business;" they are in "like relations" to the cars which they respectively manage; they are under "like conditions," as to exposure to the weather, they are "standing in the same category;" and if both are not protected from "wind and storm" there is a "preference" created—there is an "inequality" established, and the "benefits" of the statute do not "bear equally" towards such motorman and driver whose relations, conditions, exposure and need of protection in the same kind of business, are so nearly alike in every respect.

The question involved is not now a matter of such common observation in this city as it was two years ago before the law was enacted, when we had both electric cars and cars propelled by mules,

as still is the case in many of the cities of the state. Under such a law in the severest winter, the motorman in passing by the driver of the mule car could have looked out from his panoply of sheeted glass with the serenity of complete protection, and with a smile of contempt upon the storm-pelted and icied mule driver. The poor muleteer might well have asked the Legislature why is this difference between me and the motorman; and what kind of an answer would it have been for the Legislature to say "you must get a little more motion on those mules and we will—you are too slow to have any rights which we are bound to respect in this lightning age," for that is practically the argument of the prosecuting attorney.

Another objection urged to the law is that there is not by this law devolved upon any *particular* officer or agent of street railway companies the duty of providing the screens mentioned in the law. It seems to me that is a question that goes rather the practicability than to the validity of the law. It simply makes the work of the prosecuting attorney more difficult in finding out from the by-laws of the company, or otherwise, the responsible party, as he has aimed to do in these indictments, by averring it to be the duty of the defendant, as superintendent of the railway company, to provide for them, which if he should fail to prove, would defeat the prosecution were the law valid in all respects. It only shows another reason why those interested in this law should send the same back to the legislature while it is yet in session, for repairs.

The consequences of this decision are not bad, and if they were I have nothing to do with the consequences, for I am simply called upon for my opinion, and a judge is of no value who does not, on questions submitted to him, render his *honest* opinion. The consequences are not bad, for the law can be remedied in a few days by the legislature striking out of the same the one word "electric," which I cannot keep from thinking was somehow surreptitiously and unobserved inserted by the legislators.

Again: I have less hesitation in rendering this opinion for the reason that there are eight of these cases pending in this court, and if the court should go on to try the same at great labor and expense, and then thereafter have verdicts set aside because of the question made herein, it would be much cheaper, easier and better for the prosecuting attorney to make up the record in this case now, which would be brief and inexpensive, consisting only of the indictment, the de-

murrer and a brief journal entry, and have the same submitted to the Supreme court upon the legal question alone, and if my opinion is wrong we can have the other cases tried in June of this year free from any complications, except the simple one of fact as to the defendant's guilt in violation of said statute.

Prosecuting Attorney Barber is in receipt of a communication from Chase Stewart, Prosecuting Attorney of Clark county, to the effect that the case will be taken up at once. It will go direct to the Supreme Court as, under the Statute, the Circuit Court has no jurisdiction in such cases.

Entitled to Counsel Fees.

34566—Goulden vs City of Toledo, action to recover the amount of a sidewalk assessment and attorney fees in an assessment suit in which plaintiff was defeated.

HARMON, J.

Petition contained two causes of action: In the 1st plaintiff alleges that he contracted with defendant to construct a certain sidewalk on Hicks street and that defendant agreed to give him for constructing said sidewalk a valid assessment against abutting lot owners.

Plaintiff constructed the sidewalk and the defendant gave him an assessment against lots on the street, among which were certain lots belonging to Arthur Cowdrick. Cowdrick refused to pay the assessment and plaintiff brought suit against Cowdrick and failed to recover because the city, before letting the contract to plaintiff, had failed to give notice to Cowdrick to construct the sidewalk himself.

In his first cause of action plaintiff seeks to recover the amount of the assessment and interest, and in his 2nd cause of action he seeks to recover attorney's fees expended by him in his suit against Cowdrick.

To the second cause of action defendant interposed a demurrer claiming plaintiff cannot recover attorney fees.

Held by the court:

Judge Dillon in his work on Municipal Corporations, sec 472, lays down the rule that the contracts of Municipal Corporations, within their legal powers, are binding upon them the same as contracts of individuals. Numerous authorities may be cited in support of that proposition.

As to the right to recover attorney fees there is a conflict of authorities in different states. In New York it has been held that parties may recover attorney fees incurred by reason of breach of contract by defendant. Kipp vs Brigham, 7

Johnson 167. Debois vs Hermance 56 N. Y. 673; also in Massachusetts. Westfield vs Mayo, 122 Mass. 100 and in Ohio, Mc Alpin vs Woodruff, 11 O. S. 120; Lane vs Feury, 31 O. S. 574.

It was held by the Cincinnati Superior Court, at general term by Judge Force, in Kerachner vs City of Cinn. 14 Law Bull. 48 Citing 11 O. S. and, 31 O. S. sup. on failing to recover from lot owner the full amount of assessment for the construction of a sewer, by reason of failure to advertise and obtain bids for part of the work and material, that the measure of damages against the City for failure to deliver a valid assessment for full amount of the contract is, first, the difference between the amount which plaintiff was entitled to recover under his contract and the amount collected from the property owner. Second, costs taxed in the action against the lot owner. Third, a reasonable allowance for counsel fees in the action against the lot owner.

It is urged in case at bar that if the City had given plaintiff a valid assessment he would only have recovered in his action against the lot owner the amount of assessment and costs, and not attorney's fees; and it is said that he could only require the City to place him in the same position that he would have been in had the City given him a valid assessment.

This is assuming that a lot owner would attempt to make a defense to an assessment when he had no valid defense. The Court will not assume that.

Demurrer to plaintiff's 2nd cause of action overruled.

Question of Pleading.

Miller vs Southworth—Suit to recover money lost on option or an alleged gambling contract. Deft answered that sales and purchases were bona fide.

HARMON, J.

Motion to make answer more definite and certain by stating dates to and from whom purchases and sales were made, overruled. Court held that such information properly belonged to the evidence, and deft would not be required to set it forth in his answer.

Security for Costs.

32869—Wegner vs. Consolidated St Ry Co.; motion of plff to vacate order requiring security for costs, on ground that plff had been a resident since 1890, and though absent from the city when the security was required had now returned to his home in Toledo.

HARMON, J.

Held: That the Court had no power to review its former order and that it must stand.

SIXTH JUDICIAL DISTRICT.

JUDGES.

Hon. C. S. Bentley, Bryan, O.
Hon. G. R. Haynes, Toledo, O.
Hon. C. H. Scribner, Toledo, O.

Counties in the Sixth Judicial Circuit and
dates of the terms:

Erie.....	May 28	November 14
Fulton.....	June 11	November 30
Huron.....	May 14	November 7
Lucas.....	Jan. 2	September 17
Ottawa.....	June 25	December 11
Sandusky.....	June 18	December 3
Williams.....	June 13	November 26
Wood.....	April 21	October 22

DECISIONS.

Ann Coldham, Plaintiff in error, vs The American Casualty and Security Company, Defendant in error.

Opinion by SCRIBNER, J.

The plaintiff in error, as plaintiff below, brought an action against the defendant in error, as the beneficiary of an accident policy upon the life of James Coldham who, the petition alleges, died on January 7th, 1892, from a fall by slipping on an icy sidewalk on January 5th, 1892, the petition having been filed February 23rd, 1893 (over 13 months after the accident.) The petition, after alleging the incorporation of the defendant company under the laws of Maryland, and the issuance by it to said decedent of the policy, states that "a copy of which policy is hereto annexed and marked 'exhibit A.' and made a part of this petition." And it further states that "said accident policy was issued to James Coldham in his life time, on the 19th day of August, 1891 *

* and insured the said James Coldham for the term of twelve months against violent and accidental injuries, which would cause death within ninety days from the time of the happening of such accident." x x that on the 5th day of January, 1892, the said James Coldham slipped and fell on an icy sidewalk, which fall caused a rupture of the blood vessels of the brain, was paralyzed and two days after the accident, on the 7th day of January 1892, died from the effects thereof; that immediately after the accident every effort was made on the part of the plaintiff to find a person or persons who witnessed it, but without success, and not until the 6th day of February 1893, after the

exercise of the utmost diligence on her part, was a person found who saw the accident; immediately notice was then given to the local agent of the defendant and also the general agent of the Company at New York City, of the fact of the accident and also demand was made of local and general agents for the necessary blanks to make proof of death by accident, which blanks were refused. Plaintiff further says it was impossible for her, under the circumstances, to notify the company within the time limited by the conditions of the said policy and that immediately she was in possession of sufficient facts and had knowledge that the death of the said James Coldham was caused by accident, she notified the defendant thereof. That said James Coldham, up to the time of his death complied with all the conditions of his contract of insurance by virtue of said policy on his part to be performed and had paid all money due thereunder; that demand of payment has been made, but no part thereof has been paid.

A copy of the policy was attached to the petition which, among other things provides; "This policy is issued subject to the conditions on the back hereof. Its terms are not waivable by agents, and any modification thereof shall not be valid unless endorsed upon the policy by the president, vice-president or the general managers."

Among the conditions on the back were the following:

4. "Any medical adviser of the company shall be allowed to examine the person or body of the assured in respect to any alleged injury as often as he requires."

5. "Immediate written notice of accident must be given to the general managers at New York City; affirmative proof of loss must be furnished as soon as the nature and extent of the same can be determined, and legal proceedings for recovery must be commenced within 6 months in case of death, or of loss of sight or of limbs, and in case of weekly indemnity, within three months after disability ceases, and not later than fifteen months

after the occurrence of the accident on account of which claim arises."

A general demurrer to the petition was filed, which being sustained by the court of common pleas, and the plaintiff not caring to plead further, final judgment dismissing the petition was rendered.

This being taken to the circuit court on error it was.

HELD BY THE CIRCUIT COURT.

1. That though ordinarily such copy of the policy does not constitute a part of the petition, yet the plaintiff having expressly made it so, it may be considered as a part of the petition for the purpose of disposing of a general demurrer thereto.

2. That whatever might be properly said as to the allegations of the petition excusing notice of the accident for so long a time, the mere refusal to furnish blanks for proof of loss without any reason assigned therefor, there being no showing that the claim was otherwise rejected, or proof of loss otherwise waived, does not of itself excuse or waive proof of loss, and there being in the petition no averment that proofs had been furnished, nor any general allegation of the performance of the conditions of the policy by the beneficiary or representatives of the assured after his death, said petition does not state facts sufficient to constitute a cause of action. Judgment affirmed.

Right of Dower.

In the Circuit Court of Sandusky Co. Ohio, (before Bently, Haynes and Scribner, J. J.)

Mary C. King et al. plaintiffs, vs Harry King et al. defendants. Some years prior to 1887, certain 54 acres of land in Sandusky Co., Ohio, decended to Harry W. King from his father, who died intestate, subject to the dower right therein of Mary King, widow of said intestate. The south 29 acres of the tract was assigned to said widow as her dower. In 1877 said Henry King married Anna W., who, in 1881, secured a divorce from him in Ohio on account of his aggressions, and at the same time obtained a decree for alimony against him in a certain sum

payable in installments at certain fixed dates, which alimony by the terms of the decree, was made a lien on the said lands, said alimony being afterwards paid. In the said decree the following provisions appear; "It is further decreed that all right of said Anna W. King in the real or personal property of said Henry W. King, by way of dower or otherwise, be and the same hereby is released, and the alimony herein decreed is in lien thereof." It does not appear that this part of the decree was entered by agreement of parties or at the request or with the consent of said Anna W. otherwise than that it was a part of the decree in her favor generally in the case. Thereafter said Henry married Mary C. King, the plaintiff, and Anna W. married Trailkill, whose wife she yet is. Said Henry King died intestate in 1891 leaving six children and they and said Anna W., Mary and Mary C. King are parties to this action, which is to procure the assignment of dower and the partition of the land. The ages of said Anna W., Mary and Mary C. are proven in the case.

Held by the Circuit Court:

1—That Anna W. is entitled to dower in the north 25 acres but not in said 29 acres. (See R. S. 5699; I. Scribner on Dower p. 311, et seq. (1st ed.) 20 O. S. 454; 44, O. S. 645.) 4 Bull. 645.

2—That said Mary C. is entitled to dower in said 25 acres subject to said dower right of Anna W., and, in case she survives said Mary King, will be entitled to have her dower assigned also in said 29 acres, but, under the last clause of R. S. sec. 4188, cannot have it assigned now.

3—That the assignment of the dower of said Mary C. should be so made as not to include any part assigned to said Anna W., and that in order to ascertain how much land should be allotted to Mary C. in respect to that part of said land so to be assigned to Anna W., said commissioners should make valuations of the land, and have recourse to tables showing the value of the chances of survivorship between two lives similar to those appended to 2 Scribner on Dower p 468.

4—The partition of the entire 54 acres

after the assignment of said dower, will now be made subject to said dower, assignments of said Mary, Mary C. and Anna W.

Assignee's Bond.

729—James Yeaman vs Jno. G. Payne et al.

Opinion by Scribner, J.

The Court of Common Pleas sustained a demurrer to the petition of Yeaman in this case and dismissed his petition at his costs. He prosecutes error to reverse the judgment.

The petition alleges, in substance, that in 1879, one Peter Scott made a general assignment for the benefit of his creditors to James Montgomery, who accepted the said trust, qualified and gave bond according to law, with the defendants other than Meinhardt as his sureties; that the plaintiff and Meinhardt at that time had two stocks of goods in Toledo which they owned and possessed and that Montgomery as such assignee, claiming the same as the goods of said Peter Scott assigned to him, forcibly took possession of the same, converted the same to his own use as such assignee. The plaintiff and Meinhardt commenced an action against said Montgomery as such assignee for the said wrongful taking and conversion of their said goods and obtained a judgment against him as such assignee for \$7784.62, which judgment the said Montgomery afterwards paid in part, but that a balance of \$3500 and interest is still due and unpaid; that Montgomery is dead and no administrator has ever been appointed of his estate and that he left no assets.

That said acts of Montgomery constituted a breach of his bond as such assignee. A copy of the bond was attached to the petition and is in the usual form required by the Statute in such cases. Its condition is, "Now therefore if the said James Montgomery shall administer said trust in accordance with the provisions of an act of the General Assembly of the State of Ohio, entitled 'An Act Regulating the Mode of Administering Assignments for the Benefit of Creditors,' passed April 6th, 1859, and the acts amend-

tory thereof and supplemental thereto and shall faithfully perform all his duties as such assignee, according to law, then this obligation to be void, otherwise to be and remain in full force and virtue in law."

Held by the Circuit Court, affirming the Common Pleas; that said alleged act did not constitute a breach of the conditions of said bond and the said sureties thereon are not liable to the plaintiff.

Street Improvements.

736—The City of Toledo vs Bernard McMahon.

Opinion by SCRIBNER, J.

In this action an assessment is sought to be enforced for the improvement by changing the grade, grading etc., for a certain street of the city against the lot of the defendant abutting upon said improvement. The resolution declaring the necessity of, and the city's determination to make the improvement was duly passed and published, and all other requirements of the statute for the making of the improvement and the making of said assessment were complied with except only that the written notice required by R. S. sec. 2304 was not given to the defendant, who was a resident of the city.

Held by the Circuit Court:

That the defendant could not defeat the assessments on account of such want of notice to him, but that such failure to serve him with notice relieved him from the penalty of being deemed to have waived all claims for damages by not filing it with the city clerk (sec. 2315), and he can now enforce such claim, if any he has, against the city by appropriate independent action.

Decree for the city.

Independent Action Lies.

718.—Olin W. Benster vs Frank Powell et al.

Opinion by Bentley, J.

Powell et al, defendants, commenced an action in replevin before a J. P. against the plaintiff Benster for certain machinery and articles described in their affidavit in that case. At the time of executing said writ, the constable to

whom it was delivered, took from Benster's possession and against Benster's will, a large number of articles of personal property of great value which were not described in said affidavit or writ and many of them were such as not to suggest the idea that they might be comprehended in the description given in said affidavit or writ. The constable turned all said articles of property over to said Powell et al, who kept the same and converted them to their own use, and Benster brought this action for damages for such taking and conversion. The Court of Common Pleas, on the trial of this cause, held that he must work out whatever remedy he had in said replevin action and that he could not maintain this separate action, and instructed the jury to return a verdict for the defendant, which was done, and judgment rendered thereon in favor of the defendants.

Held by the Circuit Court: That the said action of the Court of Common Pleas was erroneous and its said judgment is reversed and said verdict is set aside and the cause remanded to said court of Common Pleas for a new trial and further proceedings according to law.

784—The State of Ohio vs J. M. Bour.

Opinion by BENTLY, J.

Bour was prosecuted before a justice of the peace of Lucas county for a violation of the statute regarding the sale of adulterated vinegar, and convicted, and sentenced to pay a fine and the costs of prosecution and the costs of analyzing and inspecting said vinegar. On Bour's petition in error in the Court of Common Pleas, that court reversed said judgment, and an exception was entered on behalf of the State. The State now presents this petition in error in the Circuit Court to reverse said judgment of reversal.

Held by the Circuit Court: That it has no jurisdiction of such an action, and that the said judgment of the Common Pleas is final as to the State. See *State vs Simmons*, 49 O. S. 305.

Taken from the Jury.

PUGSLEY, J.

33927—George Didman vs the Michigan Central Railway Co. Motion to direct a verdict for defendant in an action to recover damages for cattle killed by the defendant's train. It was charged that the defendant was negligent in omitting to properly fence its track and in running the train at a rate of speed prohibited by a city ordinance. The testimony on the part of the plaintiff showed the following facts: In the northwesterly limits of the city the railroad of the defendant and that of the Lake Shore railway company run for a considerable distance side by side and parallel with each other, the defendant's road being on the easterly side. Good and sufficient fences had been erected by the companies, one on the easterly line of the defendant's right of way and one on the westerly line of the Lake Shore right of way and at the time of the accident these fences were in good order and repair. The plaintiff, a dairyman, occupied a large field on the westerly side of the tracks where his cattle were pastured and a smaller field on the easterly side where his house and barn were situated.

A few months before the accident at the request of the plaintiff and solely for his convenience, the companies built a private crossing over both tracks to connect these two fields. A proper gate was placed at each end and suitable fences and cattle-guards were constructed to make the crossing complete and on the day of the injury everything pertaining to the crossing was in good order and repair. On the afternoon of Nov 1, 1892, the gate at the west end of the crossing was opened by some person and the plaintiff's cattle passed or were driven through the open gate from the pasture over the crossing and upon the defendant's track, where they were killed by the regular daily passenger train from Detroit. The evidence did not disclose who opened the gate, but it was opened shortly before the time when it was usual every day for the plaintiff or his employes to drive the cattle over the crossing from the west

field to the east field. There was no evidence tending to show that the gate was opened or was seen to be open by any employe of the defendant. There was no evidence that the crossing or gate was ever used by the defendant or any of its employes.

An ordinance of the city prohibits a greater rate of speed than 10 miles an hour. It was admitted that the train was running 25 miles an hour. The track was straight on each side of the crossing for a quarter to half a mile. There was no evidence as to the operation or management of the train other than the rate of speed. The court held:

1—As the gate was used exclusively by the plaintiff and his employes, the defendant owed no duty to him to see that it was kept closed. 114 Ind. 447, 27 Mo. app 418, 59 Mich. 618, 58 N. H. 251. But if it was the duty of the defendant to keep the gate closed, there was no evidence to charge it with negligence in that respect. The company is not liable absolutely and at once for defects in its fence caused by a third person without its fault. Having built a sufficient fence, it is not liable for defects unless it is negligent. 43 O. S. 270; sec 3324 R. S.

2—As good and sufficient fences were erected and maintained upon each side of the railroad companies right of way, the defendant was under no obligation to erect a gate on the crossing between the two tracks. The manifest purpose of the statute is to exclude cattle from the tracks, by erecting a proper fence on the line of the abutting owners land. Neither railroad company is such abutting owner. Secs. 3324, 3226 R. S. 40 O. S. 206; furthermore the crossing was constructed at the request of the plaintiff and to his entire satisfaction. Not needing and not requesting a gate between the two tracks, he cannot now complain of the omission of a gate at that point; sec. 3327 R. S.

3—There is no evidence that the injury might have been avoided by the exercise of ordinary care, if the train had been running at the rate of only 10 miles an hour. It does not appear where the train was when the cattle got upon the

track nor when the engineer first saw the cattle or might have seen them. Hence it is not shown that the excessive speed of the train caused the injury. This is necessary. In Ohio in order to make out a *prima facie* case, in an action against a railroad company to recover damages for killing stock, it is necessary for the plaintiff to prove affirmatively that the servants in charge of the train were guilty of negligence and that the injury was caused by such negligence, 37 O. S. 554, 11 O. S. 338. When the only proof is the death of the animal and the failure of the defendant to comply with some statutory duty running the train, it is the duty of the Court to declare as a matter of law that the plaintiff cannot recover. 62 Mo. 562.

These views made it unnecessary to consider the question of contributory negligence on the part of the plaintiff. The motion was granted and the jury directed to return a verdict for the defendant.

Limiting Assessments.

34520—City for use, etc., vs The Toledo Savings Bank & Trust Co. involved construction of Sec. 2283 R. S. which placed additional restrictions on assessing property for improvements.

LEMMON, J.

Court held that that section applied only to property abutting on one street and assessed for improvement there and afterwards assessed for the improvement on another street; and that the improvement of a street by first paving and afterwards by building a sidewalk did not come within the provisions of section 2283.

That section states, in placing additional restrictions on assessing property in cities, that it shall not be assessed, beyond a certain limit, for making improvements "on two streets or avenues within a period of 5 years." Held that if the law had contemplated limiting the assessment one street, in the manner urged by counsel the words on two streets would have been omitted.

Verdict Warranted by Proofs.

SATURDAY, April 7, 1894.

749—The L. S. & M. S. Ry. Co. vs. Fritz C. C. Mau, admr Joseph Sawyer.

Opinion by BENTLEY, J.

In the evening of the 7th of Jan., 1891, between 6:30 and 7 o'clock, in the midst of a snow squall, a freight train of upwards of 40 cars, headed east, stopped on the east bound main track of the L. S. & M. S. R. R., about half a mile east of Air Line Junction station, in order to switch certain cars then at the head or east end of the train, on to a side track in the company's yards at that point. The freight train was in charge of a conductor and had a head brakeman and a rear brakeman. The place and track where the freight train stood was one where trains of various kinds, as well as switching engines, were frequently passing and likely at almost any time of the day or night to be passing; the said east bound main track, and the west bound main track beside it constituting, at that point, as one witness says, "the throat of the immense business of the Lake Shore road." Said train had been standing for about 15 minutes when engine No. 17, while backing east along said track with only its tender attached, ran into the rear of the freight train, the gondola car shoving the tank on said tender into the engine cab and against the boiler-head, crushing and killing the said Sawyer, the plaintiff's decedent, and another man, and injuring some others. The rules of the company then provided as follows:

"Conductors will have charge of trains.

* * * Conductors will be held responsible for the safe management of their trains and for the performance of duty on the part of the men engaged with them while upon the road. They must know that their trains are at all times provided with everything necessary to enable them to comply with the regulations of the road.

"When any train is behind time or delayed at a station, or upon the road long enough to be in danger of being overtaken or met by another train, the conductor must have signals posted at proper

distances (not less than 800 yards) in each direction, to prevent the possibility of a collision. The proper signals to indicate danger are a red flag by day or a red light by night, in connection with one torpedo placed on the track by day or night, at least 800 yards (16 telegraph poles) distance in each direction of the road, and in such a position that the flag or light may be seen at least one mile before reaching the place of danger. When the conductor is absent on another part of the train or fails to properly to attend to his duties by ordering the rear brakeman to protect the rear end of the train, the rear brakeman must go back with the proper signals and protect his train, whether such order has been received or not. He will be held equally responsible with the conductor for the safety and protection of the train.

"When within the limits of the various yards all trains must be run with great care, and under the control of the engine-man, so that he may at all times be able to stop within the range of his vision. Whenever the track is obstructed within the yard limits, yard and trainmen must do all that can possibly be done to protect trains, and every man will be held strictly accountable for the manner in which this duty is performed.

"At night, or in foggy or stormy weather, or at places where signals cannot be seen, for at least one mile, the flagman will place one torpedo upon the rail, at a distance of at least 16 telegraph poles from the train; he will then go a distance of eight more telegraph poles from the train, and place another torpedo upon the rail, and remain there until recalled by the whistle of his engine; but if a passenger train is due he must remain until it arrives.

"The rear end of every train and of every engine alone, running upon the road must always display a red light at night. The rear car of all freight trains must always display a green flag during the day.

"The Toledo yard extends from the Bicycle company's switch on the Detroit division, and the west switches of Air

Line Junction yards to the slow-board 2000 feet east of the east switch at Rockwell Junction. Engines and trains within the limits of the yards must proceed with caution and under such control as to be able to stop within the limits of vision. All trains within these limits will be subject to the orders of the general yard master and his assistants, and must proceed with care, expecting that of other trains immediately in advance of them. Any delayed train must protect itself instantly by the proper signals."

The evidence showed that neither the rear brakeman or any person went back upon the track to flag approaching trains or engines, nor were any signals by way of torpedoes placed upon the track, or otherwise, given. The evidence of the plaintiff tends to show that there were no lights on the rear of the freight train and that on account of the darkness and the snow, no one upon engine 17 saw the rear of the freight train or knew that there was any obstruction until a moment or two before the collision and too late to prevent it and that the rear brakeman was then upon the rear car; and the evidence for the defendant tended to show that a red lantern was hanging at the side of said gondola car within about a foot of the rear end and that said brakeman had a lantern showing a white light on his arm. The evidence on behalf of the plaintiff tended to show that there was no light of any kind at the rear of said freight train and that the persons upon the engine though looking ahead saw no such light. The evidence also shows that said conductor, though within sight of the rear of his train and where he could have seen the brakeman going back with a light if he had in fact gone, did not order the rear brakeman back nor attempt to notice whether he had so gone or not, but attending to said switching, relied entirely upon the rear brakeman's observing the rules of the company for the protection of said train.

The evidence also shows that an assistant yardmaster of the company, who had just quit his work for the day in said yards, came down said track from the

west shortly before the collision, and climbed on to said rear gondola car for the purpose of going home, and saw the rear brakeman there with the white light but gave him no directions.

Said engine No. 17 was a switch engine employed in said yards and the plaintiff was a switchman or helper and a part of its crew, working daytimes in said yards, and his work for the day being over and said engine going eastward towards his home, he and other members of the crew, as had long been the custom, were riding upon it for the purpose of being taken nearer their home. Said freight train was not provided with any torpedoes such as are specified in said rules.

The jury having rendered a verdict in favor of the plaintiff below for \$6750, it was

Held by the Circuit Court: That said verdict was warranted by the proofs.

Judgment affirmed.

Supercedas Bond.

726—Alias S. Cohen et al. vs. John F. Cover, trustee. Error.

Opinion by HAYNES, J.

In this case suit was brought in the Common Pleas upon a supercedas bond filed in the Supreme Court of this state, in a case decided by the Circuit Court of Putnam county, wherein American Hand Sewed Shoe Company and others were plaintiffs and H. B. Claffin & Co. and others were defendants. The supercedas bond recited a judgment in the Circuit Court of Putnam county "for about (\$15,000) fifteen thousand dollars and for costs about \$2,500," with conditions under Sec. 6718 Revised Statutes.

In the suit upon supercedas bond the petition set forth the judgment of Circuit Court, which was a judgment under Sec. 6344 Rev. Statutes, in which judgment the Circuit Court declared void as against plaintiff and other creditors of O. B. Ramey, certain mortgages of personal and real property and certain conveyances of notes and accounts made by O. B. Ramey to H. B. Claffin & Co. in contemplation of insolvency and to prefer

creditors, and adjudged that Claflin & Co. held the property subject to the right of the plaintiff's other creditors to have the same applied to the payment of their claims, and ordered the judgment certified to the Probate Court to have a trustee appointed to carry out the trusts as provided in said section 6344. Upon the trial in Common Pleas Court the proper issues having been joined between the parties, the plaintiff Cover, trustee, to maintain the issues on his part, offered in evidence a copy of the judgment in case last mentioned, which was objected to on the ground that it was not the judgment described in the bond set forth in his petition. Held, that the objection was well taken, and that the Court of Common Pleas should have rejected the same as evidence.

In the Supreme Court the petition in error filed there was dismissed for the reason that the plaintiff in error had failed to have the record in the case printed as required by the practice of that court, and upon motion made had refused to reinstate the case, and it was urged that no recovery could be had upon the bond because the judgment of the Circuit Court had not been affirmed.

Held that the judgment of dismissal was equivalent to and in substance an affirmation of the judgment of the Circuit Court.

Each Assessment Valid.

34626—Wm. E. Cole vs Samuel A. Hunter, treas. This was an action to enjoin the collection of two assessments.

PUGSLY, J.

An assessment was made upon a lot for paving the street. Two years afterward another assessment was made upon this lot for a stone sidewalk in front of the lot upon the same street. The aggregate of the two assessments exceeded 25 per cent of the value of the lot. The question was whether the limitation in sec. 2271 R. S. applies to each assessment separately or to the aggregate of both assessments. That section provides that "the assessment specially levied upon any lot for any improvement shall not in

any case exceed 25 per cent of the value of such lot after the improvement is made." It was not claimed that the case came under sec. 2283 R. S. which provides a special limitation when a lot is assessed "for making two different streets within a period of five years." The court held that under sec. 2271 the two assessments could not be added together in applying the limitation, but that each assessment was valid to the extent of 25 per cent of the value of the lot after the improvement was made, for which the assessment was levied.

Probate Court.

Distribution to Legatee.

MILLARD, J.

In re estate of Francis P. Isherwood. Petition of Lizzie M. Isherwood for order to show cause why balance of legacy should not be paid her. Demurrer by executors.

November 13, 1882, Francis P. Isherwood executed his last will and testament which has been duly admitted to probate and record in this court.

In said will he bequeathed to his daughter, Libbie Maria Isherwood, the sum of \$10,000 to be paid her by his executors out of his estate in installments as they "think best or the situation of circumstances may require." He nominated two executors, W. S. Lamb and Leander Burdick, and also specified that they were to be guardians of said Libbie Maria Isherwood as well, with full power to manage and control or invest, at their own discretion, the \$10,000 willed her.

Said Lamb having died, a codicil was written by testator to said will naming Walter J. Chase and Eugene W. Gage as executors of his estate and guardians of said daughter, but revoking the clause of said will conferring power on said other gentlemen named as executors and guardians.

August 7th, 1893, this will was filed in the Probate Court of Lucas county, O., for probate, the daughter having in the meantime become of age, and on August 10th letters testamentary were issued to

said Chase and Gage to administer said estate. March 27th, 1894, said Libbie M. Isherwood filed with Probate Court her petition for an order citing said executors to show cause why they should not at once pay to said legatee the sum bequeathed her by her father.

In said petition she alleges that on Feb. 17th, 1894, there was paid said executors \$15,071.46 and that they also had in their possession a large amount of other assets; that deceased left no debts; and that no debts are outstanding against said estate which are entitled to preference over the claim of petitioner, except the allowance to the widow for one year's support, \$3,000.

Petitioner also says that she has no means of her own, other than this legacy and that the executors have begun in the Common Pleas Court a proceeding adverse to her interests in said estate and that she has no means to employ counsel and protect her rights before said court, and that said executors have notified her that they will pay her no further part of said legacy until such time as they see fit. To this executors interpose a demurrer for the following reasons:

I. Said petition does not state facts sufficient to constitute a cause of action.

II. Said petition does not state facts sufficient to entitle petitioner to the relief prayed for.

III. The court has no jurisdiction of the cause of action.

IV. Said petition is premature for the reason that it does not show that eighteen months have expired since the executors filed their bond, and that all debts of said estate have not been paid and an order of distribution to heirs and legatees has been made by this court.

For the purpose of this decision the first and second grounds of this demurrer will be considered as one.

As the case stands now the demurrer is an admission of the truth of properly pleaded facts set out in the petition. These facts are that no debts exist against the estate of deceased; that a large sum of money is in the possession of the executors belonging to said estate and appli-

cable to the payment of petitioner's claim; that she is being put to the necessity of employing counsel to defend her property rights in another court by these executors and that they refuse to advance her of her legacy with which to help herself to defend; that no debts exist for the payment of which the money on hand will be required.

I think these facts are sufficient to warrant overruling the 1st two grounds of the demurrer.

As to the 3d ground of the demurrer, going to the jurisdiction of the court.

Sec. 523 of the Revised Statutes declares that There is established in each county of this state a Probate Court, etc.

Sec. 524 reads: The Probate Court shall have exclusive jurisdiction, except as hereinafter provided.

1st. To take proof of wills, etc.

2d. To grant and revoke letters testamentary and of administration.

3d. To direct and control the conduct and to settle the accounts of executors and administrators, and to order the distribution of estates, etc., etc.

In the case of Disney, executor, vs Howes, decided by the Hamilton county District Court and reported in 12th Weekly Law Bulletin, page 322, that court holds that:

1st. The Probate Court has the power to pass on the validity of the claims of legatees, and order their payment before final distribution of the estate.

2d. Legatees are entitled to demand payment of their legacies within the four years limited for the presentation of the claims of creditors, upon a satisfactory showing to the Probate Court, and the giving of an undertaking to the executor, if any be required by the court.

From the reading of Sec. 524 and the wording of the above decision I am led to believe that this court has full jurisdiction of this cause of action.

As to the 4th ground, That the action is premature, because 18 months have not elapsed since executors filed bond, etc. While it is true that by terms of section 6113 of the Revised Statutes, creditors have four years within which to

present claims against an estate, and that the executor who distributes an estate before that time may become responsible should debts mature prior to the lapse of such period, yet the question in this case is whether under all the circumstances surrounding its present condition this court has the right and power to order payment of this legacy.

The rights of creditors are superior to those of legatees and in considering the present petition we need consider the sections of statutes referring to creditors, claims no further than to bear in mind at all times the superiority mentioned.

As bearing on this question of premature application by petitioner, I regard the decision of the case of *Disney, exor, vs Howes*, above cited, (12 Weekly Law Bulletin, 322) as being quite in line and decisive. The 2d clause of the syllabus says that legatees are entitled to demand payment of their legacies within the four years limited for the presentation of the claims of creditors, upon a satisfactory showing to the Probate Court, and the giving of the undertaking to the executor, if any be required by court.

In the case of *the Bible Society vs Weddell*, reported in 29th Cin. Law Bulletin, Judge Williams in delivering the opinion of the Supreme Court, on page 147, says, in discussing the rights and liabilities of executors, legatees, etc: "It may be fairly inferred from the Statute that a legatee can require the payment of his legacy before the expiration of the four years; but when he does, he may be compelled to give bond and security therein provided for."

In *Dawson vs. Dawson*, 25th O. S. p. 443, this same doctrine is recognized and the court say that a legatee or distributee cannot maintain an action on the bond against an executor, etc., etc., within the four years allowed by law for creditors to present their claims without an order of the Probate court requiring such payment. This clearly shows that the Supreme court are of the opinion that a legatee may sustain an action against the executor within the period of four years, and that the sound discretion of the court may be

called upon to say whether and on what conditions such legatee may receive relief.

In the case of *Dawson et al. vs Patterson et al.* decided by the Supreme court of Pennsylvania and reported in the 16th Atlantic Reporter, page 38, in discussing the discretion of executors, placed with them by testator in his will, as to payment of legacies, etc., court says: "The court, can direct such legacies to be so paid, notwithstanding the discretion given to the trustees, when, after the lapse of a reasonable time since the death of testator, it appears that a portion of the estate can be sold for that purpose without loss or injury."

From this, and especially from the determinations of our own Ohio courts, I am led to believe that this action is properly brought, and will have to overrule the 4th ground of demurrer.

Now, as to the propriety of court granting the prayer of the petition. There have about seven (7) months elapsed since said executors gave bond, etc. The time within which debts are to be proven has not yet elapsed. Ordinarily it would not do to order distribution of an estate at so early a period; but there are some things shown by the records of this court of which we can take judicial notice, that have a bearing on this case and will be something of a guide for action. In the first place the estate is one of considerable value; it is largely composed of real estate.

Secondly—The business in which deceased was engaged was a partnership, and the surviving partner has elected to and has taken said business, or the interest of deceased therein, at its appraised value, and paid same to executors in cash, and has also given bond to the satisfaction of this court for the payment of all debts of said co-partnership.

Third—By the terms of the will of said *Isherwood* this legacy was made payable out of the corpus of the estate, and not from income or personal estate only.

By the laws of Ohio governing executors and administrators they are required to "proceed with all diligence to pay the

debts of deceased," and to administer estates; and that they should settle as speedily as possible is the rule of all decisions. That when debts are all paid it is the duty of executors to pay legacies and make distribution of the remaining estate is well settled and redognized.

That no unnecessary delay may arise it is provided by section 6189 of the Revised Statutes that legatees, etc., may provide for payment of debts by leaving sufficient in hands of executors and distribute in kind the remainder of the estate.

That the condition, age and surroundings of a testator may be taken into consideration by courts in determining probabilities which necessarily enter into any calculation to be made is, I believe, well established.

Then, what should be done in this case? The testator was a man well along in life. For some years he had lived leisurcly and was more than ordinarily careful and prudent in his matters of expense. The debts for which he might have been liable, growing out of his co-partnership transactions, are provided for by the bond of the surviving partner; a large surplus of cash in bank, with a small possibility of any debts ever turning up against the estate for which any part of it may be required to pay. Against any debts, so far as this legacy is concerned, stands the entire real estate of deceased. That we could order this legacy all paid to the petitioner, by requiring a bond of indemnity or to return, if needed, is beyond question in the mind of the court. Should it be made at present without such bond? The court believes it safe to so order, but, at the same time, it should always guard its officers from all possible risk or danger and should leave them, as near as justice will permit, with all the safeguards that the law throws around them.

Under the peculiar circumstances of this case, with a suit pending against petitioner which she is unable to defend without a portion of this legacy, and which if not defended she fears will loose to her valuable property rights, and being so situate that to compel her to give a

bond when not absolutely necessary, would work to her a great hardship, I am of the opinion that good conscience requires that I make an order that the executors of said Francis P. Isherwood pay over to said legatee, Libbie Maria Isherwood, without requiring of her a bond to refund in case later found indebtedness should require it, the sum of \$3000, less what she has heretofore had on said legacy from said executors. It is so ordered. Exceptions noted.

A Common Carrier.

HARMON, J.

32906—T. A. A. & N. M. Ry Co. vs M. C. R. R. Co.

The M. C. R. R. Co. used tracks of the T. A. A. & N. M. Ry Co. from Alexis to the Pennsylvania depot. The latter company charged for such use, in the beginning 50 cents per car, but subsequently increased the charge to \$1.00 per car and later to \$2.00 per car. Defendant company paid the charges at the rate of 50 cents per car and at the increased rate of \$1.00 per car. They refused to pay at the rate of \$2.00 per car but continued to use the tracks.

On the first trial the court held that the T. A. A. & N. M. Ry Co., in permitting such use of its tracks by the M. C. R. R. Co. was not performing the duty of a common carrier and therefore had a right to charge whatever they saw fit for the use of said tracks; and that the M. C. R. R. Co. could elect whether it would use said tracks and pay what the T. A. A. & N. M. Ry Co. elected to charge or not. A verdict for about \$19000 was returned for the plaintiff.

Defendant filed a motion for a new trial and upon a further consideration of the facts the court held that the T. A. A. & N. M. Ry Co., in permitting the use of said tracks, was performing the duty of a common carrier in supplying an instrumentality of transportation and could charge for such use only a reasonable sum; that evidence as to whether or not the charge of \$2.00 was a reasonable one should have been left to the jury and that the refusal to permit evidence tending to show that \$2.00 was unreasonable was error.

Verdict set aside and new trial granted.

Supreme Court.

SUPREME COURT PROCEEDINGS.

Thursday, April 17, 1894.

General Docket.

2318. Susan Fleming vs Dorothy Turney. Error to the Circuit Court of Pickaway county. Judgment affirmed.

2596. I. J. Miller et al, trustee vs J. D. Inskip, treas. et al. Error to the Circuit Court of Logan county. Judgment affirmed.

2627. The P., C. & St. L. Ry. Co. vs James W. Wilkin. Error to the Circuit Court of Tuscarawas county. Judgment affirmed.

2721. John F. Clawson vs A. M. Beattie, adm'r. etc. Error to the Circuit Court of Huron county. Revivor in name of Abram Harris adm'r. of John F. Clawson deceased.

2735. Xavier Bruilport vs Ross Wise. Error to the Circuit Court of Brown county. Judgment affirmed.

2749. Scott Stevens vs Edward Swerlein, guardian etc. Error to the Circuit Court of Wyandot county. Judgment affirmed.

3646. C. M. McPherson vs Boyd E. Furnas, auditor. Error to the Circuit Court of Miami county. Judgment affirmed.

3664. The F. Schumaker Milling Co. vs Wm. F. Schoener. Error to the Circuit Court of Summit county. Judgment affirmed. Burket, J. dissents.

3666. The United Firemens' Insurance Company vs Mary Kukral et al. Error to the Circuit Court of Cuyahoga county. Judgment affirmed.

The following causes on the General Docket, are dismissed for want of preparation.

2758. Evertt G. Herrick vs the Buckeye Brewing Co. et al. Error to the Circuit Court of Lucas county.

2764. John Matthews vs Matthew Hanna. Error to the Circuit Court of Fayette county.

2766. The Seneca County Mutual Insurance Co. vs the Bowling Green Glass Co. Error to the Circuit Court of Wood county.

2770. Thomas F. Thresher vs Edwin R. Stilwell et al ex'rs et al. Error to the Circuit Court of Montgomery county.

2777. George B. Smythe vs Martha Wintemute. Error to the Circuit Court of Licking county.

2778. James Nelson vs Louis Zettler et al. Error to the Circuit Court of Franklin county.

2780. The Seneca Mutual Fire Ins.

Co. vs L. Gast & Co. Error to the Circuit Court of Franklin county.

2782. Wm. Carlin vs Wm. L. Kramer. Error to the Circuit Court of Hancock county.

2795. Lewis Gade vs Jacob Hercules. Error to the Circuit Court of Hancock county.

2800. Daniel Hull vs Samuel O. Ewing, sheriff et al. Error to the Circuit Court of Mahoning county.

2813. C. E. Riley et al vs The Ohio Oil Co. Error to the Circuit Court of Auglaize county.

2815. Wm. R. Ogier et al vs Alexander G. Patten. Error to the Circuit Court of Franklin county.

2825. Robert H. Thorpe et al vs Leonard Mornington. Error to the Circuit Court of Clarke county.

2830. Thomas O. Phinney vs Almira Reed et al. Error to the Circuit Court of Franklin county.

2835. James R. Woodworth vs Hannah Miller et al. Error to the Circuit Court of Wayne county.

2836. C. Aultman & Co. V. Harry M. Haines. Error to the Circuit Court of Union county.

2837. John Ward vs David Pepple et al. Error to the Circuit Court of Darke county.

2840. B. J. Redmond vs the Harris Stove Pattern & Machinery Co. Error to the Circuit Court of Vinton county.

2847. Walter C. Tisdell, Auditor et al, vs Samuel Wire. Error to the Circuit Court of Lake county.

The following causes on the General Docket are dismissed for failure to file printed record.

3891. Dora M. Morse et al, vs Ezra J. Potter etc. Error to the Circuit Court of Cuyahoga county.

3909. J. B. Doney & Co. a partnership &c. vs David M. Young. Error to the Circuit Court of Franklin county.

3912. Michael Muller vs Edward H. Weissenborn et al. Error to the Circuit Court of Hamilton county.

3914. Lemuel M. Southern vs Grant D. Williams. Error to the Circuit Court of Cuyahoga county.

Motion Docket.

2142. Benjamin F. Bushnell vs The State of Ohio. Motion by plaintiff to advance cause No. 3538, on the General Docket. Oral argument requested, motion allowed and request for oral argument noted.

2143. Cassius Trumkey et al, vs the State of Ohio ex rel. Brownell Hull et

al, Trustees. Motion by defendant to extend time (30 days) to file printed briefs in cause No. 2788, on the General Docket. Motion allowed.

2144. James McCloud et al, vs the City of Columbus. Motion by plaintiff to advance No. 3933, on the General Docket. Motion overruled.

2145. The Cincinnati Inclined Plane Ry Co. vs The City of Cincinnati. Motion by plaintiff to advance No. 3872, on the General Docket. Oral argument requested. Motion allowed and request for oral argument noted.

2146. Andrew Oberlin et al, vs Rezin B. Wasson et al. Motion by plaintiff to advance No. 3940, on the General Docket. Oral argument requested. Motion allowed and request for oral argument noted.

2147. Andrew Oberlin et al, vs Rezin B. Wasson et al. Motion by defendant for more complete record in cause No. 3940, on the General Docket. Oral argument requested. Motion sustained as far as to require the plaintiff to print the reply and overruled in all other respects. Request for oral argument noted.

2148. William Monypeny vs Joseph Metz. Motion by defendant to advance cause No. 3920, on the General Docket. Motion allowed.

2140. The Gill Car Mfg Co. and Wilson L. Gill vs Edward C. Roberts et al. Motion by plaintiffs for extension of time to file printed briefs in cause Nos. 2818 and 2819, on the General Docket. Motion allowed and time extended to May 30, 1894.

2150. The B. & O. R. R. Co. vs Daniel S. Ambach. Motion by defendant to dismiss cause No. 3941, on the General Docket. Motion overruled.

2152. The C. C. C. & I. Ry Co. vs Charles V. Rasey. Motion by defendant to advance cause No. 3907, on the General Docket. Motion allowed.

MARCH 13, 1894.

2497—John N. McKeon vs Harriet Ferguson.

Error to the Circuit court of Trumbull county.

Washington Hyde for plff in error.

Izant & Stewart for deft in error.

BY THE COURT.

Prior to the eleventh day of April, 1871, L., then a married man, gave a mortgage on lands to M., the wife of L. not joining, and on that day the wife of L. filed her petition against her husband for divorce and alimony, and described in her petition the lands and the mortgage thereon. At the June term, 1871, a di-

vorice was granted to her by reason of the aggressions of her husband, and the mortgaged lands were decreed to her as alimony, subject to the payment of the mortgage.

In 1873, M. obtained a decree of foreclosure of his mortgage against L. and his divorced wife and in 1878 the lands were sold under said decree and bid in by M., sale confirmed, deed made, and M. put in possession of the lands. In May, 1887, L. died, and thereupon his widow, who had married a Mr. Ferguson in the meantime, began suit against M. for dower in the land. Held: That she is not entitled to such dower. It is urged in behalf of the widow that she never relinquished her right of dower in the lands; that the conditions of the mortgage being then broken, L. had no title to the lands, but only an equity of redemption; that this equity of redemption only was allowed to her, and not the full title to the lands.

Section 5699 Revised Statutes, provides that where the wife procures a divorce from her husband, by reason of his aggression, she shall, among other things, if she survive him, "be entitled to her right of dower in the real estate of her husband, not allowed to her alimony, of which he was seized at any time during coverture, and to which she had not relinquished her right of dower."

This section of the statute deals with the land, rather than with the title. The decree in the divorce case ordered that she have and hold in her own right the lands in question, and ordered L. to convey the same to her, and in default that the decree stand and operate as such conveyance. She prayed to have the land allowed to her as alimony, and when so allowed she accepted it, resided thereon, and paid a small part of the mortgage debt. By the express provisions of the statute she is not entitled to dower in the same lands allowed to her as alimony.

The judgment of the Circuit Court, allowing her dower, is reversed, and the judgment of the court of Common Pleas is affirmed.

Judgment reversed.

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OF INTEREST TO EVERY LAWYER.

The reception accorded to the weekly edition of the TOLEDO LEGAL NEWS has been very gratifying to us and the immediate returns from outside towns indicate that the publication is likely to receive universal support.

The first issue was faulty in many respects owing to a variety of causes, the most prominent of which was inexperience in arranging matter for a strictly legal publication. Those who received sample copies of the first issue will also receive this one, gratis, and we hope its merits and improvements will be carefully observed. We do not expect, however, to attain anything like perfection for some little time. Eventually the manifold duties of editing and managing such a journal as we expect to publish, and we have a lofty, up to date ideal in this line, will be developed to a point where there will be no occasion for apologies and little room for criticism. In the mean time we believe the LEGAL NEWS will offer, with all that may be lacking or crude in its character or make up, abundant information to entitle the enterprise to your support. It belongs to your profession, it will watch and consult your interests, and, if properly supported, will be a credit to your state.

It will be well to remember, too, that "he

who gives promptly gives twice as much," And this is particularly true of "giving" the support which is due to an enterprise. This one has come to stay but it will arrive at maturity and greater usefulness, if you are prompt in recognizing it.

At present the business demands our close attention to a multitude of details at the home office and we shall make no personal solicitations for subscribers. Those who require the information we furnish, and it is invaluable to every practicing attorney in Ohio, should subscribe at once. We shall require, after a few months, all subscriptions to be paid yearly in advance, but in order to give the public a chance to take the journal on trial we will accept subscriptions for three months, payable in advance. No more sample copies will be furnished and for that reason we again briefly state the information which the LEGAL NEWS will contain:

Supreme Court decisions.

Decisions of the 6th Judicial Circuit

in all counties in the district, viz:

Erie.....	May 28	November 14
Fulton.....	June 11	November 30
Huron.....	May 14	November 7
Lucas.....	Jan. 2	September 17
Ottawa.....	June 24	December 11
Sandusky.....	June 18	December 3
Williams.....	June 13	November 26
Wood.....	April 21	October 22

This does not mean that we will publish a decision from that court occasionally but means, that we will publish every decision rendered by that Court and in all the counties.

Decisions of Common Pleas Court in Lucas county, each one of importance, and decisions from other parts of the state.

Decisions from Supreme, Circuit, Common Pleas and other Courts in all the states.

New Laws passed by the State Legislature together with such miscellaneous matter as will be of interest to attorneys.

AMENDMENTS TO RULES

OF THE UNITED STATES CIRCUIT COURT OF APPEALS.

SIXTH CIRCUIT.

3.

TERMS.

One term of this court shall be held annually on the Tuesday after the first Monday of October, and adjourned sessions on the Tuesday after the first Monday of each other month in the year, except August and September.

All sessions of the court shall be held at Cincinnati, unless otherwise especially ordered by the court.

At the October, February and May sessions of the court, hereafter referred to as "calendar sessions," there shall be a regular and peremptory call of a calendar containing all the cases upon the docket which under the rules should then be ready for hearing.

At other than calendar sessions, the court will hear any case upon the docket in which the record has been printed and briefs for both parties filed, provided that there has been also filed in the clerk's office, on the Monday preceding the first day of such session, the written consent of counsel for both parties that such hearing may be had.

At other than calendar sessions, the court will also hear, upon application of appellant, an appeal for any interlocutory order granting a preliminary injunction, provided counsel for appellant shall have served upon counsel for appellee the printed record and the printed brief for appellant at least six days before the hearing.

At other than calendar sessions, the court will also hear all motions and miscellaneous business, and will announce opinions.

Prmulgated February 23, 1894.

Ride 23 is amended so as to read as follows:

23.

PRINTING RECORDS.

1. The clerk shall supervise the print-

ing of all records, and, upon the docketing of a case, shall forthwith cause an estimate to be made of the cost of printing the record, and his fee for preparing it for the printer, and for supervising the printing thereof, and shall at once notify the attorney for the plaintiff in error or appellant of the amount of such estimate, which shall be paid to the clerk within ten days after such notice. If not so paid, the writ of error or appeal may be dismissed upon the motion of the opposite party, or by the court of its own motion.

2. After the payment to him of such estimate the clerk shall cause at least twenty-five copies of the record to be printed forthwith, and shall furnish to each of the respective parties three copies thereof, and take a receipt therefor.

3. Parties may agree, by written stipulation filed with or prior to the filing of the record, that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record.

4. If the cost of printing and supervision shall be less than the amount estimated and paid, the clerk shall refund the difference to the party paying the same. If the cost is greater than the estimate, the amount of such excess shall be paid to the clerk before he shall file the printed record or deliver any copies thereof.

5. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing and supervision shall be taxed against the party against whom the costs are given, and shall be inserted in the mandate or other proper process.

6. In any case where the case shall have been printed in the court below, either circuit judge may, on the written application of the plaintiff in error or appellant, order that such printed record, if properly indexed, may be used in place of the printing hereinbefore provided for.

7. The clerk of this court shall receive proposals for printing, which shall be submitted to the senior circuit judge,

who may, in his discretion, award such printing to the lowest and best bidder, and all such printing shall be done by the person to whom the same is so awarded; and, when a case shall be heard upon a record printed in the court below, the cost for printing shall be taxed on the basis of such bid for printing, except when the parties otherwise agree.

8. The fees of the clerk of this court for supervision shall be the same as those of the clerk of the supreme court for the same services, which are at present designated by the supreme court rule 24, as follows:

For preparing the record, or a transcript thereof, for the printer, indexing the same, supervising the printing, and distributing the printed copies to the judges, the reporters, and the parties or their counsel, fifteen cents per folio.

Promulgated January 2, 1894.

Rule 26 is amended to read as follows:
26.

FORM OF PRINTED RECORDS, ARGUMENTS, AND BRIEFS.

1. All records shall be of a uniform size, printed in small pica type, 24 ems to a line, 48 lines to a page, solid, with an index, and a suitable cover containing the title of the court and cause, the court from which the case is brought to this court, and the number of the case; size of pages to be $9\frac{1}{4} \times 7\frac{1}{4}$ inches, except that in patent cases the size of the pages shall be $10\frac{1}{4} \times 7\frac{3}{4}$ inches; that is to say, large enough to bind in copies of patent office drawings and specifications without folding.

2. All arguments and briefs of attorneys shall be printed, and conform as near a practicable to the size of the printed record.

Promulgated January 2, 1894.

Subscriptions should be addressed to the TOLEDO LEGAL NEWS Co., Toledo, O., and accompanied by remittance by draft or P. O. money order. Subscribe for the LEGAL NEWS for three months any way. At the expiration of that time you will renew your subscription for a year.

Common Pleas Courts

OF OHIO.

The following are among the important and interesting decisions of a recent date.

TAXATION OR CONDEMNATION

Not An Estoppel—Give No Rights to Individual Against the City.

33061—L. Eliza Myers vs City of Toledo, action to recover specific parcel of real estate lying within limits of 16th street between Jefferson and Monroe streets.

Plaintiff alleges that she is the owner of property and entitled to possession and that defendant wrongfully with-holds it.

The city sets up three defences:

1st—A general denial. 2d—Possession and use as a public street in the city of Toledo for more than 21 years. 3d—Dedication for street purposes by James Myers, from whom plaintiff claims to derive title.

The reply denies the city's possession for 21 years and alleges plaintiff's (and those under whom she claims) possession for more than 21 years; also denies dedication and alleges that the city is estopped from claiming the property within the limits of city by having taxed for street improvements, and otherwise, and also by reason of having commenced condemnation proceedings to obtain possession of it; also alleges that the questions have been adjudicated in an action where in J. W. and Sarah M. Myers were plaintiffs and the city defendant in 1866 in District Court of this county.

Held by the Court:

HARMON, J.

Plaintiff showed a regular chain of record title from the Government to herself and the issue made by general denial found for the plaintiff.

The issue made by city's claim of use for street purposes found for plaintiff, such use not being established; court finds that James Myers et al in executing what is called the "Gower map," and in a decree of partition in an action in the old court of chancery in this county in 1846, and by the conveyances of James Myers of land platted upon the Gower

map since that time, dedicated 16th street.

On the issue made in the reply in which plaintiff alleges that she, and those under whom she claims, have been in possession of property for more than 21 years, the court finds that James Myers took possession of the property in 1846, with other property, and immediately inclosed it; that that inclosure continued until about 1864, when the fences became dilapidated and the land was thrown open to commons. Court also finds that James Myers' possession was not adverse; that it was temporary and consistent with his dedication of the streets through that tract, the city or the public not having occasion at that time to use the said streets.

On the allegation of estoppel by taxation, assessment and proceedings to condemn for street purposes, it is held that such proceedings give no rights to individuals who may be notified to pay taxes or assessments or who may be brought into court upon condemnation proceedings; that individuals have no occasion to notice such proceedings and if they do and pay money expecting to get title they do it at their peril.

The decree of the District Court in April, 1866, adjudged J. W. and S. M. Myers to be owners of the land at that time claimed by the city to be within the limits of 14th street between Jefferson and Monroe streets. Plaintiff here claims through J. W. and S. M. Myers but the finding and decree of the District Court should not be extended beyond the land described in that case, the title to which was quieted by that decree in J. W. and Sarah M. Myers. Moreover this question of adjudication by District Court in 1866 was, in substance, passed upon and decided against plaintiff by our Circuit Court in a recent decision in Reynolds vs Newton et al.

Judgment for defendant.

Bank Not a Party.

34660—Dunn vs Dewey, action on promissory note.

HARMON, J.

Plaintiff filed his petition and alleged

execution of the note by defendants; set forth a copy of the note with endorsements; stated that it was unpaid and that there was due on it the sum of \$2900.12.

Defendants, in their answer, alleged that on the day the note became due they deposited with the First National Bank of Toledo a check for the amount due on the note and that plaintiffs deposited the note with the First National Bank for collection. The defendants alleged that the bank accepted the check, charged it to defendants and gave plaintiffs credit for that amount and marked the note paid and the defendants say, the note was paid. "with the aforesaid." Plaintiffs then filed a supplemental petition making the First National Bank a party defendant.

In their supplemental petition plaintiffs reiterated all the allegations of the original petition and referred to defendants answer and alleged that if it was true, as stated, that the bank was a necessary party to the action and held to the payment of the money.

The bank filed a demurrer to the supplemental petition.

The Court holds: That the note could only be paid in money unless the plaintiffs accepted something else in lieu of money and that the note being deposited with the bank for collection it had no authority to accept anything but money as payment; that whether the answer of defendants constitutes a defense it is not necessary to decide, but that the supplemental petition alleges no facts which constitute a cause of action against the bank,

Demurrer sustained.

GUARDIAN'S PERSONAL DEBT.

Stock Issued to Guardian in Return for Stock owned by Estate.

MARCH, 3, 1894.

33131—First National Bank of Bellevue vs Merchants National bank of Toledo, et al. The action related to 30 shares of the capital stock of the Merchants National bank of Toledo which was part of the stock owned by Virginia B. Warn and

standing in her name at the time of her death in 1877. Her husband, Monroe C. Warn, was appointed guardian of their two minor children and in 1878 the bank issued to him as guardian a certificate for the stock in controversy, in exchange for a similar certificate of Mrs. Warn's stock. June, 1890, Warn gave to the plaintiff a judgment note for \$3,300 payable on demand and as collateral security endorsed and delivered to plaintiff said certificate held by him as guardian. The plaintiff claims the stock by virtue of such pledge and asks that the stock be sold for the payment of such note. The defendant, Aletta B. Warn, admx of the estate of Virginia B. Warn, claims the stock as a part of the assets of said estate and needed for the payment of debts against said estate. It was alleged by the plaintiff that the money received by Warn for the note was used by him in improving the homestead on Ashland avenue, which was owned by the children subject to their father's life estate, and that on June 2, 1891, Warn delivered to the children a deed of conveyance of his life estate in consideration of his pledge of the stock to the plaintiff, and based upon these allegations, numerous legal questions were raised and discussed.

PUGSLEY, J.

The Court held that the Merchants bank had no authority to issue the stock to Warn as guardian. It belonged to the estate of Mrs. Warn and could be lawfully issued only to the administrator, and it was found from the evidence, aside from any question as to the power of the guardian to pledge the stock, that the plaintiff did not occupy the position of a bona fide holder. No money was loaned to Warn at the time of the pledge of the stock and the position of the plaintiff was not in any respect changed on account of the transfer of the stock. It was pledged to secure the personal debt of Warn contracted in 1887, for which he gave his note and which note was renewed from time to time until the demand note of June, 1890, was given.

It was further found that no part of the money received by Warn from the plain-

tiff was used in improving the homestead and that none of it was borrowed for that purpose and also that the allegation of an acceptance by the children of their father's life estate in place of the stock was not sustained by the proof. And it was held that such an agreement if proved, would not be binding upon the children in equity. Since becoming of age they have done everything that was possible to repudiate any arrangement by which it was sought to deprive them or their mother's estate of the stock. The Court held that the admx was entitled to the stock and that plaintiff had no equities in it as against her claims or the claims of the children. A decree was rendered finding the equities of the case with defendants and ordering the cancellation of the certificate in question and the issuing of a new certificate for a like amount to the admx.

FUNDS OF AN ESTATE.

Administrator Charged with Interest.

34551—In the matter of the estate of Wm. Thornton, deceased; action to recover interest on money held by an administrator. Thornton died in — leaving unknown, non-resident heirs.

LEMMON, J.

Court held that the weight of authorities in United States does not warrant charging an administrator with interest unless it is shown that the money was used by him, that he obtained interest on it or valuable use of it or that he held it such a length of time as would make it inequitable not to allow interest on it. But that it is competent for the legislature to provide regulations governing such matters and that by section 6191 R. S., which appears to be a legislative regulation looking toward the employment of funds in care of an administrator, it is provided that if any sum of money shall remain in the administrator's hands for six months he may apply for an order of the Probate Court permitting him to invest such funds for the benefit of the heirs. It did not appear that any order was

made regarding the investment of funds in this case or that any such order was asked for by the administrator. It did appear, however, that there was no reason for holding the funds unemployed, because the administrator's account filed appears to have been a complete, final account and nothing remained for him to do but turn the property over to the heirs.

They were not here and the evidence did not show what was done in reference to finding them other than a charge of \$10 for such services. Court held that after the administrator made his final report showing nothing necessary to be done except to make a settlement with the heirs the balance due them should have been invested for their benefit.

There was no evidence that the administrator ever received any benefit from or interest on the money. He kept it in his bank account with his own funds. Court held that under the Statute referred to money should have been put at interest or that the administrator should have at least called the attention of the Probate Court to it. That the word "may," as used in the Statute, meant must, and imposed upon the administrator the duty of investing the funds. Ordered that administrator be charged with interest on balance in his hands.

CONTRACT FOR SALE OF STOCK.

Property Destroyed While Negotiations Pending.

LEMMON, J.

34449—Davis vs. Parker. Suit to recover \$1,000 paid as part of purchase price on property destroyed by the falling of the Wheeler Opera House wall and the subsequent conflagration. Davis and Parker had entered into a contract, the first paragraph of which provided that Parker should sell to Davis all fixtures, including horses and wagons, used in his grocery and meat market business, for \$1,415—of which the latter had paid \$1,000.

The following paragraph of the contract was in relation to a sale of the stock

and contained the provision that if, upon inventory, the total amount, including the sum for which the fixtures were sold, did not exceed \$3,000, Davis should pay cash. If the amount exceeded \$3,000 the balance should be secured by mortgage.

The issue between plaintiff and defendant involved the question whether property which was the subject of contract between the parties had, before same was injured or destroyed, become the property of plaintiff or remained the property of defendant.

The plaintiff claimed it had not become his property, and that the transaction involving the contemplated purchase by plaintiff had not been completed. That parties intended to do and perform many other matters before it should be turned over to plaintiff.

On the contrary, defendant claimed that contract had force and effect to convey and put over to plaintiff the title and ownership of the property described in the first paragraph of the contract, and that the remainder of property described in contract became property of plaintiff by force and effect of contract upon the completion of the inventory. That the inventory was completed on the 19th (the fire was on the evening of the 20th) and that the ownership of the property had become vested in Davis, but that Parker had the right to retain possession until the money was paid. That the agreement for a sale of the fixtures and the agreement for a sale of the stock were separate and distinct contracts.

This the plaintiff denied, and claimed that the contract constituted one indivisible contract, and that no portion of the property became plaintiff's until all matters of contract had been adjusted. That parties were to have met on the morning after the fire to complete the purchase and that the destruction of the property intervened and prevented a completion of the contract.

Evidence indicated that Parker immediately after the fire understood the loss would fall on him and that while the inventory had been completed parties

were to have met on the morning after the fire to complete the transactions. Parker filed proof of loss with one insurance company claiming the stock belonged to him absolutely and with another company for loss on fixtures, alleging that he was the owner subject to such rights as were acquired by Davis under the contract which was set forth.

Judge Lemmon charged the jury, in substance, as follows:

The contract between plaintiff and defendant is not two different contracts but one indivisible contract. It contemplates a sale and purchase of all property belonging to the business and when any became the plff's property it all became so. There was a modification of the written contract by oral agreements relative to the amount of stock. It was competent for the parties to settle between them when the property should vest in the purchaser and it is competent, in determining that time, to inquire what the parties intended. "We say to you that when the terms of a sale of specific goods are agreed upon and the bargain is struck and every thing which the seller has to do with the goods to complete the contract the sale becomes in general, perfect and the property at the risk of the buyer. It must be remembered, however, that the parties by their agreement and understanding fix the time when the property is to become the property of the purchaser and that the rule above stated is a rule of construction only when no understanding or agreement has been prepared."

If oral agreement had been entered into concerning the stock and the amount to be sold and purchased, terms of payment, etc., it became competent for the jury to inquire what was the contract or the intention and understanding of the parties. In determining this the jury might, the Court said, consider the acts of the parties prior to, at the time and after the accident. If they found the fact to be that written contract contained all the agreements of the parties and that the defendant had performed all the conditions of the contract and simply held the

property awaiting the plaintiffs performance of his contract the verdict must be for the defendant.

Verdict for plaintiff \$1,048.50.

PAYMENT TO CONTRACTOR

In Settlement of Account for Materials Previously Received. Unauthorized.

35279—Kesting vs Donohue, involving rights of mortgagees and claimants under mechanics liens, principal question was as to payment by a Loan Company of money borrowed for building purposes. The defendant, Mrs. Donohue, had contracted for a loan of \$2,200 to be advanced to the contractor and expended under her direction, or her husband's, acting as her agent.

HARMON, J.

Certain payments were made and at the time when the third became due the contractor had become embarrassed. In order to enable him to go on with the building Donohue told the Loan Company to advance money necessary to do so. Subsequently, finding that the work was not being done, Donohue notified the Loan Company to pay no more money to the contractor. Evidence indicated that immediately after Donohue directed the secretary of the Loan Company to pay money to the contractor, the latter went to the Western Mfg. company and agreed to turn \$600 of the \$800 still coming to him over to the them in settlement of an account, not for supplies to go on with the building but in settlement of account for supplies already received. The Western Mfg. company verified his statement concerning money due from the Loan Company, and secured from its secretary a promise to turn it over to them, which was subsequently done.

Held that this was without authority of Mrs. Donohue or her agent, and that the Loan Company had no authority to apply the money without same; that the payment therefore did not apply on the loan, and that the Loan Company must make good the amount paid to the West-

ern Mfg. company for distribution among present lienholders.

Delay in completing the building, delay in making the payments, court held that one offset the other.

DORMANT JUDGMENT

Cannot be Revived in Common Pleas Court by Filing Transcript and Bringing Suit.

34680—Kopf vs Denning.

HARMON, J.

The petition in this case states that plaintiff obtained judgment against defendant before Justice of the Peace in 1876. Execution immediately issued and was returned unsatisfied. In May, 1893, transcript from the docket of the justice was obtained and filed in the clerk's office of this court. Petition filed on May 29th 1893, states amount of judgment and costs, and that it is wholly unpaid, and prays to revive the judgment and for "all proper relief."

A summons was issued and endorsed "action to revive dormant judgment and for money only." Defendant answered, and case was submitted to the court, witnesses sworn and testified.

The court held that the judgment could not be revived but that on the allegations contained in the petition and under the prayer for "all proper relief," plaintiff might have judgment against defendant for the amount of the judgment before the justice, and costs, with interest from June 13, 1876, the day when the judgment was entered on the docket of the justice of the peace.

ORDINARY PRUDENCE

Requires Exercise of Faculties of Seeing and Hearing.

Krasinski vs Mich. Central R. R. Co. Personal injury suit—Motion to arrest case from jury at close of plaintiff's testimony.

Krasinski, a teamster, was injured at Michigan Central crossing, Wagon Works. Evidence indicated that lumber

was piled on each side of the roadway: on the right hand side there was a space of 16 to 20 feet from the westerly rail of the main track to the lumber pile; on the left lumber was also piled, but evidence did not indicate the distance from the track.

Krasinski, the evidence showed, was driving along slowly and as he approached the track looked to the left but not to the right. His testimony was to the effect that he looked to the north (his left) and before he could look to the south he was struck by a train from that direction. The evidence indicated, however, that he had ample time to do so for his horse had crossed the track and was not injured in the accident.

HARMON, J.

Although the evidence indicated that the train was running at a high rate of speed, and approached the crossing without warning, the court held that the law as laid down in Penn. Co. vs Rathgeb, 32 Ohio State, was applicable to the present case.

In that decision the supreme court held that "ordinary prudence requires that a person in full enjoyment of faculties of hearing and seeing, before attempting to pass over a known railroad crossing, should use both for the purpose of discerning and avoiding danger from approaching trains, and omission to do so, without reasonable excuse therefor, is negligence and will defeat action by such person for injuries to which such negligence contributes."

Court directed and jury found a verdict for defendant.

Appeal Bond.

35698—Geirl vs the Metropolitan Life Ins. Co. Motion to quash appeal, appeal bond signed by Ketcham National Bank. HARMON, J.

It was contended that the bank had no authority to bind itself. Court held that while this was undoubtedly true it was not sufficient ground for quashing an appeal, but that party might be required to give additional bond; motion overruled.

In Other States.

SUPREME COURT OF ILLINOIS.

OPINION FILED MARCH 31, 1894.

WILLIAM A. STANTON *v* CITY
OF CHICAGO.

Appeal from County Court of Cook co.

SPECIAL ASSESSMENT FOR SEWER—
ORDINANCE DOES NOT STATE THAT
SEWER IS IN CHICAGO.

That the ordinance levying a special assessment for the construction of a sewer, not showing that the sewer to be constructed, was within the limits of the city of Chicago, the order of the County Court confirming the assessment is reversed — [ED. CHICAGO LEGAL NEWS.

CRAIG, J.—This is an appeal from the County Court of Cook County confirming a special assessment levied for the purpose constructing a proposed sewer and the only question presented by the record is in regard to the sufficiency of the ordinance. That part of the first section of the ordinance which is material to the present inquiry is as follows:

Be it ordained by the city council of city of Chicago, section 1. "That a vitrified tile pipe sewer be construed and laid along the center line of the alley west of Grand Boulevard from and connecting with the sewer in 45th st street." * *

By this section it is also provided that the "grade of the bottom of the inside thereof shall be five feet above the city dictum." * *

The objection to the evidence is that it fails to state that the proposed improvement lies within the city of Chicago. The ordinance being the foundation of the proceeding, unless it is valid, the assessment resting upon must fall. Sec 135 of Chap. 24 of the statute requires the ordinance to specify the nature, character and locality of the improvement, and we have held in a number of cases that this section of the statute must be observed by a city or incorporated town in making a special assessment, otherwise the assessment could not be sustained.

From the ordinance it is impossible to tell whether the starting point of the improvement is within or outside of the city,

and the same is true in regard to the point where the improvement terminates. One requirement of the statute is therefore omitted from the ordinance, the locality of the improvement. This the city had no power to do. It is however said in the argument, that the bill of exceptions did not purport to contain all the evidence, and hence, it will be presumed that other evidence was heard which cured or supplied the supposed defect in the ordinance.

It is, however, manifest from the record, that the entire proceeding, resulting in the confirmation of the assessment, was predicated upon the ordinance, it is therefore difficult to perceive what proof could be introduced which could aid or cure the defect in the ordinance. Parol evidence could not be resorted to, and there is no pretense that any other ordinance was passed or relied upon by the city. We do not therefore see how the suggestion in regard to the bill of exceptions can be of any avail. We think the objection to the ordinance in the hearing was good, and the County Court erred in confirming the assessment. The judgment of the County Court will be reversed and the cause remanded.

Reversed and remanded.

Mr. James A. Peterson, for appellant.

Mr. John S. Miller and Mr. Charles C. Gilbert, for appellee.—Chicago Legal News.

DISTRICT REPORTS.

sidewalk—Rights of Tenants.

OPINION FILED MARCH 24, 1894.

Cunningham *vs* Entrekin.—Sidewalk—Rights of Tenants—*Usque ad filum viæ*—Where a house is rented to different tenants, each occupying a room he has let, the doctrine of ownership *usque ad filum viæ* has no application. All that any such tenant is entitled to is an uninterrupted passage-way in common with the public, for none of them has any lordship of the soil outside of his several domain. No private right of way can exist in a public highway.

Equity—Injunction—Show Case on Sidewalk—Different Tenants—A tenant

of a ground floor has no equity to enjoin the tenant of a second floor from maintaining a proper show case on the sidewalk at the entrance set apart for his use, which was shown not to be an obstruction to the sidewalk, either to the general public or to the full enjoyment by the objecting tenant of his premises. Such a suit is frivolous and without equity.

Exceptions to master's report. C. P. No. 4, Phila. Co., June T. 1891, No. 1321, in equity.

The facts clearly appear in the opinion of the court.

The exceptions assigned error (1) in holding that the court had jurisdiction; (2) in holding that the maintenance of a show case was an unjustifiable infringement by defendant of the rights of plaintiff; (3) in holding defendant liable for two-thirds of costs; (4) in recommending an injunction, restraining defendant from maintaining any show case on pavement or doorstep on west side of Broad street; (5) in not recommending that the bill be dismissed.

W. W. Smithers, for plaintiff, exceptant, cited Att'y-Gen. vs Ry. Co., 1 W. N. 489; Com. vs R. R., 12 H. 160; Remier's Ap. 100 Pa. 182; Snyder vs Hersberg, 33 Legal Int. 158; Herman vs Saller, 25 W. N. 408.

John Dolman, for defendant.

Thayer, P. J.—A large building at the northwest corner of Broad street and Columbia avenue, belonging to Richard J. Dobbins, was rented to different tenants. The plaintiff in this case, who is engaged in the business of a merchant tailor, rents the first floor, the front of which is on Columbia avenue and the rear door on Broad street. The defendant, who is a photographer, rents the second story room immediately over the plaintiff, and his entrance and exit is by the door on Broad street. After he had moved in he placed upon the pavement by the side of this door a show case for the exhibition of his pictures. There is no evidence that this show case obstructs the passage-way into or out of the building, or that it is injurious or inconvenient

to any one. The plaintiff, however, conceiving himself apparently to be the owner of the street pavement, as well as the store, which he occupies and rents, brought this bill against the defendant, in which he seeks to enjoin the defendant from maintaining his show case upon the sidewalk, and also from maintaining an awning which the defendant had put over the door to temper the intensity of the summer sun. As to the awning the master rejected the plaintiff's claim for the very satisfactory reasons that it was conclusively proven that the plaintiff had deliberately consented to its erection by the defendant before it was placed there, and because the awning itself was shown to be neither injurious nor inconvenient to any one whomsoever, but, on the contrary a convenience to people entering there, as well as a necessary protection of the defendant's pictures from the weather.

The master, however, was of the opinion that the plaintiff had a special property in the sidewalk, and therefore that the placing of the show case upon it, however harmless it might be, was a technical trespass on the part of the defendant, against which the plaintiff was entitled to be relieved, and so found in his report, and recommended a decree enjoining the defendant from maintaining his photographic show case upon the sidewalk. This, we think, was a mistake. Where a house is rented out to different tenants, each occupying the room which he has let, the doctrine of ownership *usque ad filum viæ* has no application. The plaintiff in this case had no more ownership of the sidewalk than the defendant or the tenants of the other rooms had. All that any of them were entitled to there was an uninterrupted passage-way in common with the public, for none of them had any lordship of the soil outside of his several domain. Nor can a private right of way exist in a public highway: 4 Leading Cases in Am. Law of Real Prop., 183, and cases there. The location of a street or highway extinguishes a private way: *Ib* 326; Mussey vs Proprietors of Union Wharf, 41 Maine

34: Abbott vs Stewartstown, 47 N. H. 228; Hancock vs Wentworth, 5 Metc. 446.

If the defendant's photograph case was an obstruction to the full enjoyment of the premises rented and occupied by the plaintiff, the defendant might properly be enjoined from maintaining it, but it is clear that is not the case. There is no evidence whatever that it is injurious or in any way even inconvenient to the plaintiff. On the contrary, it was proven before the master that after the show case was placed there, the plaintiff not only made no objection to it, but declared that it was an ornament to the doorway, and attracted a great deal of attention. That the defendant, under these circumstances, should be harassed by a law suit, and mulcted in costs amounting to over three hundred dollars for a perfectly harmless act, simply to gratify the plaintiff in the maintenance of what he fancied to be a technical right, but which turns out to be no right at all, is wholly inequitable and unjust. The case presented is altogether without any foundation in equity. It is frivolous and such as no chancellor or court of equity ought to countenance or to entertain. The learned master did well in dismissing that portion of the plaintiff's case which related to the awning and the inside doors. He would have done better if he had dismissed the whole case as entirely wanting in equity.

Exceptions sustained, and it is ordered that the bill be dismissed, the plaintiff to pay the costs.

POLLUTED STREAM.

Riparian Owner Can Recover Damages.

In Drake vs Lady Ensley Coal and Iron Co., decided in the Supreme Court of Alabama in February, 1894 (14 S. R., 749), it appeared that an owner of land on a stream used the water to wash ore taken from the land, and then allowed it to return to the stream so polluted that it was unfit for use by stock, and covered the land of a lower riparian owner with mud and refuse ore. It was held that the latter could recover damages.

The Court said in part: The principle of law declared in Iron Co. vs Dye (87

Ala., 486) does not sustain the proposition to which it was cited. That was a bill for an injunction to restrain the use of the washers. Considerations arise in applications for injunctions which do not exert a controlling influence upon a right of action for damages; and in that very case it is said: "The plaintiff should have been remitted to a court of law for the recovery of his damages." The case of Coal Co. vs Sanderson (113 Pa. St., 126, 6 Atl., 453) cited by counsel, goes far to sustain the contention of appellee. In this case it is held that "the use and enjoyment of a stream of pure water for domestic purposes by the lower riparian owners * * * must *ex-necessitate*, give way to the interest of the community, in order to permit the development of the natural resources of the country, and to make possible the prosecution of the lawful business of mining coal." The conclusion reached is not in harmony with the prior decisions of the same court. The same principle announced in 113 Pa. St. (6 Atl., *supra*), to some extent has been applied in cases of irrigation (Schilling vs Rominger, 4 Colo., 100; Yunker vs Nicholas, 1 Colo., 551). The case from 113 Pa. St., (6 Atl., *supra*), is an authority we think very much weakened by the subsequent cases in the same state of Robb vs Carnegie Bros. & Co (145 Pa. St. 612, 23 Atl., 219). In the latter cases it was held that "a manufacturer of coke from coal not mined on his own land is liable in actual damages to a lower proprietor for the pollution of a stream as a necessary incident to his business, and also for actual damages done to crops and the soil." The case in 113 Pa. St., 6 Atl., is not overruled, but is commented on, and the distinction is drawn that in the latter case (113 Pa. St., 6 Atl.) the ore was being mined by the owner of the soil, and in the two latter cases the coke was not mined on the land upon which it was manufactured. It seems to us that if, in the case where the coal was mined on the land of the owner, he was exempt from damages, upon the ground that the individual or minor interest must yield to the greater and paramount interest of the public, it would make but little dif-

ference where the coke was mined. The manufacturing of the coke from the ore was that which contributed to the paramount and public interest. On the other hand, if the owner is to be exempted from liability because the ore was mined on his own land, and not because of public benefit, then the doctrine of "*sic utere tuo ut alienum non laedas*," would be abolished, and the rights of lower riparian proprietors, almost universally recognized and protected, would be destroyed. A lower proprietor purchases under the protection of the rule that "*aqua currit, et debet currere, ut solebat*," at least to the extent that the servitude of his land shall not be added to by artificial means or the industry of man (*Boynton vs Longley*, 19 Nev. 69, 6 Pac. 437, 3 Am. St. R., 781, and note).

Under the provisions of the Constitution, private property cannot be taken for public uses, or for corporations, without just compensation being first made to the owner, except by his consent. The courts—and it was never intended to be understood otherwise—are not the "masons" to "chisel" away vested rights of property of private individuals, however humble and obscure the owner, for the benefit of the public or great corporations. It is the pride of this Republic that no man can be deprived of his property without due process of law, and the poorest citizen can find redress for an unlawful injury caused by his wealthy neighbor, by appealing to the courts of his county.

We are satisfied that plaintiff's complaint showed a good cause of action, and there was evidence tending to sustain it (*Railroad Co. vs Hamilton*, Ala. 14 South., 117; *Hughes vs Anderson*, *supra*; *Iron Co. vs Dye*, *supra*; *Boynton vs Longley*, *supra*; *Robb vs Carnegie Bros & Co.*, 145 Pa. St., 324, 22 Atl., 649; *Lentz vs Carnegie Bros. & Co.*, 145 Pa. St., 612, 23 Atl., 219; *Crabtree vs Baker*, 75 Ala., 91; *Farris vs Dudley*, 78 Ala., 124; *Stein vs Burden*, 29 Ala., 127; *Pettigrew vs Evansville*, 3 Am. Rep., 50; 6 Am. & Eng. Enc. Law, 149).

ASSETS OF AN ESTATE.

Debt Payable If Creditor "Ever Needs It."

In a proceeding entitled, *In re Colgan's Estate*, decided in the Supreme Court of Pennsylvania in March, 1894 (28 Atl., 646), it was held that where a balance of the consideration for a farm is to be paid by the grantee if the grantor ever needs it, and the grantor dies without demand it, but without doing anything to extinguish the debt, it is an asset of her estate and should be set off against a claim by such grantee against the estate for board of deceased.

The Court said: When the deed for the farm was executed and delivered by Sarah Colgan to Jesse Jackson for the consideration of \$2,800, of which \$2,000 was secured, the remaining \$800 was a debt due and owing by Jackson to his grantor. It was admitted before the auditor that this sum was to be paid if Sarah Colgan ever needed it. She therefore had the legal right to demand it, and that right continued until the time of her death. She did not demand the money in point of fact, but she never surrendered her right to do so, and did nothing to extinguish the debt. The grantee, Jackson now claims that Sarah Colgan was indebted to him, at the time of her death, for 80 weeks' boarding and nursing furnished by him, and which he claims was worth \$10 per week, amounting, in all, to \$800. He never demanded payment of this claim during Sarah Colgan's life, and it can well be understood that she omitted to demand payment of the \$800 due her on account of the fact that she was receiving boarding and nursing from him. But it will require some effort to believe that, if he had presented his bill during her life, she would not thereupon have expressed her need of the \$800 which he owed her on the land. However that may be, it cannot be questioned that any one who is in debt has need for the use of money for the extinguishment of the debt. Literally, the debt due by Jackson to the decedent was never surrendered or extinguished up to the moment of her death, and we do not understand how the mere fact of the death

could produce such extinguishment. At the very moment of her death other persons became vested with her rights, and, as to them, nothing but the absolute discharge of the debt by her in her lifetime, or its disposition by will, could relinquish Jackson from the obligation to pay it. It is not enough to say she did not demand it. She had the right to demand it up to the instant of her death, and that right she never surrendered. It was therefore an asset to her estate. The claim of \$800 for boarding and nursing was allowed by the auditor and learned Court below but they refused the set-off of the \$800 owing by Jackson to the decedent, because she never demanded its payment. We cannot assent to that conclusion, and therefore hold that the one debt should have been applied to the payment of the other, for which it was certainly needed.—N. Y. Law Journal.

Verdict of Jury Set Aside.

William Wahl's suit against his cousin, Herman Wahl, a grocer, for \$5,000 damages for plucking out his whiskers, which has been on trial for two days before Judge Pryor in the Court of Common Pleas, resulted yesterday in a verdict for the plaintiff for six cents damages. The plaintiff in his testimony claimed that defendant was the aggressor, and that he pulled all the beard on the left side, beside a part on the other side. The defendant in his testimony lay all the blame on the plaintiff. In his charge Judge Pryor called the attention to the fact brought out in the evidence, as bearing upon the credibility of the defendant, that he had been twice convicted of adulterating his milk. As to the subject matter of the trial, the question was who was the aggressor. Pulling a man's whiskers out by the roots he charged to be, *per se*, a serious injury, a most ruthless invasion of personal sanctity. It was for the jury to determine whether the plaintiff's story was true. After the jury, who had deliberated for an hour, had announced their verdict, Judge Pryor at once set it aside. "This is one of the most preposterous verdicts I ever knew a

jury to render," he said. "By your verdict you say you believe the plaintiff's story, showing that a most unprovoked, wanton and brutal assault has been made upon him, inflicting a great personal indignity and physical and mental pain, and yet you say that six cents compensates for all his pain and outrage." Mr. Altmeyer was plaintiff's attorney, and ex-Judge Steckler conducted the case for the defendant. N. Y. Law Journal.

The Ohio Legislature.

COLUMBUS, O., April 19, 1894.

The following sections to the general statutes have been amended by the legislature during the past week:

H. B. No. 532 amends sections 4513 and 4527. In the former section the provision relating to the filing of a petition and bond for locating and establishing a ditch is eliminated. In the latter by eliminating the fee prescribed for the above purpose.

H. B. No. 471 amends section 4446c by providing that the manufacturer, importer or agent of commercial fertilizer shall pay a license fee of \$20 on each brand.

H. B. No. 592 supplements section 897, making a special provision for Henry co.

S. B. No. 186 supplements section 3751 by making provision as to how the board of religious colleges and universities may be constituted and governed.

S. B. No. 42 supplements section 6968 by prohibiting the setting of trot lines in any of the reservoirs in the state.

S. B. No. 287 amends section 1808, fixing the salary of the police court clerk in Cleveland.

H. B. No. 126 is a new act relating to the reports of railroad and telegraph companies to the state commissioner, and requires such companies to pay the expenses of that department.

H. B. 559 amends section 306, requiring the use of first class oil in mine s.

H. B. No. 207 amends sections 4452 and 4460, supplements 4451 and repeals sections 4457 and 4458, relating to drains and ditches.

COLUMBUS, O., April 23.

The following is the result of the general legislation during the past week:

H. B. No. 147 amends section 4904, as amended May 4, 1891, relating to the protection of improved roads from heavy burdens.

H. B. No. 275 amends section 5367 as follows:

Sec. 5367. When a judgment, including judgments rendered by a justice of the peace or mayor, a transcript of which has been filed in the court of common pleas has become dormant, or when any finding for money in any equitable proceedings, which in whole or in part remains unpaid under the order of the court made therein, said judgment may be revived, or said finding may be made subject to execution as judgments at law are, in the same manner as prescribed for reviving actions before judgments, or by action in the court in which said judgment was rendered or finding made, or in which transcript of judgment may have been filed. When either party to such dormant judgment or finding, his agent or attorney, makes affidavit showing that the adverse party is a non-resident of the state, and that such judgment or finding remains unsatisfied, in whole or in part, and the amount owing thereon, service may be made by publication, as in other cases, but only for such judgments or findings in which personal service has originally been made on the adverse party. If sufficient cause be not shown to the contrary, the judgment shall stand revived, and the finding be subject to execution for the amount which the court finds to be due and unsatisfied thereon; and the lien of the judgment for the amount due shall be revived, and shall operate from the time of the entry of the conditional order or the filing of the petition.

H. B. No. 452 is a new law which provides for the establishment of a course of practical and scientific instructions in the art of clay making and ceramics in the Ohio State University.

H. B. No. 637 is a new law which imposes a direct inheritance tax of one per

cent on all estates of \$20,000 or over \$50,000; when it exceeds \$50,000 and not over \$100,000 a tax of one and one-half per cent, etc.

H. B. No. 845 amends sections 1708 a, 1709 a and 1713, relating to the municipal officers of Cincinnati.

H. B. No. 715 amends sections 1, 2, 4, 9, 14 and 15 of the collateral inheritance tax law of 1893. The amends reduces the sum from \$10,000, as it originally was, at three per cent, to \$200 at five per cent, 75 per cent of which goes to the State and 25 per cent to the County wherein the same is collected. Such tax becomes due and payable upon the death of the decedent, and remain a lien until so paid. If the tax is not paid in one year, eight per cent interest is charged, and after eighteen months it is made the duty of the prosecuting attorney to begin action to recover the same.

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JUDGES.

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Hon. G. R. Haynes, Toledo, O.
Hon. C. H. Scribner, Toledo, O.

USE OF SIDEWALK.

PARTIES MAY LAWFULLY OBSTRUCT TEMPORARILY.

Persons Using Walk Must Wait or Exercise Care in Passing.

John Berdan et al, plaintiffs in error, vs Alexander B. Brownlee, defendant in error.

On May 22, 1890, and long before and since Berdan & Co. (plaintiffs in error) carried on a wholesale grocery business in a building fronting on St. Clair street in the city of Toledo, a street 66 feet wide with a double track street railway in the center, and a stone walk on each side 15 feet wide, the street and walks being much used by the public; the building extending back from the street to an alley in the rear and having a door also opening on the alley. They received at and shipped from their said building a large amount of grocer's stock in boxes, packages and barrels over said walk on St. Clair street.

To haul the goods, they employed drays which were backed up to the curb stone with the rear of their beds projecting over the outer part of the sidewalk about a foot, and about 20 inches above it. Across the rear of the dray bed was fastened a rod over which hooked irons which formed the outer end of the side pieces of a "skid" which was formed of two wooden bars about two by four inches and twelve feet long, and 20 inches apart, and were held parallel to each other by wooden cross pieces, the other end of which "skid" rested upon an "incline" which was about four inches thick on the edge next to the door sill, against which it lay, and ran to a thin edge about 3½ feet on the walk outwardly from the door sill, said incline being about 7½

feet wide and the inner end of the skid, when in position for loading and unloading goods from a dray, coming up to within about three feet of the door sill, thus forming an obstruction to those passing on that sidewalk entirely across the walk except a three foot space over said incline around the inner end of the skid.

About one o'clock p. m. of said day, which was bright and pleasant, the skid was in said position, hooked on to the back end of a dray loaded with barrels of sugar, which was being unloaded and rolled down the skid into the building. Boxes and bales of goods were piled three or four feet high upon said walk on each edge thereof and for several feet on both sides of the skid and coming up to within 3½ to 5 feet of the skid in such manner as to leave a clear space three or four feet wide about the middle of the walk.

After two or three of said barrels had been unloaded, it became necessary to swing the inner end of the skid around towards the north (to the right when facing the building) partly off said incline so as to allow a hand truck loaded with goods to pass from the walk south of the skid up said incline to the building. An employe of Berdan & Co. had thus swung the skid around, and the truck had passed in, when a lady came along said walk from the south and started to go around the inner end of the skid and across the incline, but turned when she reached the end of the skid and went back. The said employe thereupon being on the south of the skid, immediately stepped across to the north side of it, turned around, bent over and took hold of the skid to re-adjust it to the dray in order that the unloading might proceed, and at that instant the defendant in error, a business man of Toledo for many years, 37 years of age with health and faculties unimpaired, came along said walk from the north unobserved by said employe, and glancing at the dray and doorway, but without pausing, or looking at either end of the skid, stepped upon it near where said employe then had hold of it, and by reason of its outer and northerly rail not

being supported on the dray, on account of its being swung to the north as aforesaid, it tipped, and the defendant in error fell to the walk and sustained a severe injury to his elbow. The position of the skid, and that one rail so as aforesaid unhooked, could have been seen by him plainly had he looked at it. Held, by the circuit court, that Berdan & Co. had a right to the reasonable use of the sidewalk and said skid for the purpose of receiving and shipping goods at and from their said store, and that, while in the careful and reasonable use of the same, they might lawfully obstruct the walk temporarily, and that persons using the walk must either wait until such temporary hindrance was removed or otherwise avoid it; or, if with reasonable care they could pass over, they must exercise such reasonable care in choosing the manner of passing, and in the act of passing.

Held also, that a verdict against the plaintiffs in error when the facts as aforesaid stated are undisputed, is not warranted by the evidence, and that the judgment should be reversed and the verdict set aside and the cause remanded to the court of common pleas for a new trial.

PETITION IN ERROR.

Not filed Within the Time Required by Law.

Sherman W. Lott, Administrator, etc., vs The Toledo Con. St. Ry. Co.

The verdict in this case was rendered on the 24th day of June, 1893, in the Court of Common Pleas, and a motion for a new trial was overruled and judgment rendered on the verdict July 8th, 1893. The bill of exceptions was signed on the 25th day of August, 1893, and filed on the next day. The petition in error was filed in the Circuit Court August 26, 1893, but no praecipe for a summons in error issued until February 8th, 1894; more than six months having thus elapsed between the rendition of the judgment and the issuing of the summons in error.

Counsel for the defendant in error now moves the court to set aside the issuing and service of the summons in error and to order the petition in error stricken

from the file for want of authority of the clerk to issue such summons in error and for want of Jurisdiction of the Circuit Court to entertain the petition in error, and cited 16 O. S. 542 and 89 O. L. 45. The Court suggested that perhaps the case reported in the Law Bulletin of March 5th page 127 might affect the question as to whether the bill of exceptions was filed within time; but without deciding upon that, granted the motion to set aside the issuing of service of summons in error and ordered the petition in error stricken from the file as not filed within the time required by law.

OFFICERS AND DIRECTORS.

Acting in Good Faith Not Personally Liable in Damages to Stockholders for Losses.

724—Fanny B. Bond vs Isaac N. Poe et al.

Opinion by HAYNES, J.

The plaintiff brings this suit in behalf of herself and other stockholders of the Union Manufacturing Company, which is insolvent and its affairs being wound up and its stockholders assessed to pay it debts in other actions.

The present action is against the President and Directors of that corporation to recover damages for alleged negligence and mismanagement by the officers and directors, of its affairs and business whereby it is alleged its stock was rendered worthless, its business ruined, its assets wasted and its stockholders assessed large amounts for the payment of its debts.

The main questions arising upon the issues of fact, were referred to a jury in the Court of Common Pleas which jury found in favor of the defendants, and judgment being thereafter rendered by the Court of Common Pleas for the defendants, the case was appealed to the Circuit Court and tried upon substantially the same evidence. The Circuit Court finding that the immense losses of the corporation were due mainly to the fact that the company had added to its original woodenware manufacturing, the

manufacture and sale of sewing machines on a large scale, which business was in its nature and in the usual manner of carrying it on, one that required a large outlay and attended with great risks, and that the stockholders were for years well aware that the company was engaged in said business and acquiesced therein, and that the errors in its management were those of judgment and were committed while the defendants were acting in good faith and therein risking large sums of money of their own advanced to the corporation, and that they had not been guilty of such wrongful or negligent actions as to warrant their being held liable in damages personally, entered a decree in favor of the defendants.

DEFECTIVE BRIDGE.

Judgment for Injuries to Street Car Employee—The City, Consolidated Street Railway Company and the Lake Shore & Michigan Southern Railway Company, Defendants.—The Liability of Each.

The Toledo Consolidated Street Railway Company, Plaintiff in Error vs Thomas Sweeney et al, Defendants in Error.

HAYNES, J.

On the 15th of April 1892, Thomas Sweeney, then a conductor upon the cars of The Toledo Consolidated Street Railway Company, in Toledo, was in charge of one of the cars crossing a bridge over the track of the Lake Shore & Michigan Southern Railway Co at the junction of St. Clair street and Maumee avenue. The car upon which he was riding, and which he had charge of, had received some injury or had become defective, and for the purpose of returning it to the stables of the company it was being pushed by another car of the company to which it was attached, of course. While the cars were upon this bridge, the bridge suddenly gave away and fell, bringing the two cars together. Sweeney was standing upon the rear end of his car, and one Mammett of the other car was standing

immediately opposite, and as the cars went down the rear end of the car upon which Sweeney stood collided with the front end of the other car and he received severe injuries, Mammett at the same time being killed.

Sweeney brought an action in the Court of Common Pleas against the Com. St. Ry. Co., the City of Toledo and the L. S. & M. S. Ry Co., jointly, and recovered for the injuries which he received upon this occasion. He set up in his petition the various facts upon which he claimed that each of the defendants were liable to him by reason of negligence upon their part causing the injuries which he had received.

The case passed to trial in the Common Pleas, was tried to a jury and a verdict was rendered in favor of the plaintiff for the sum of fourteen thousand dollars, and each of the defendants filed a petition in error. They deemed it necessary each to take a bill of exceptions, and upon the overruling of the motions for a new trial each filed a petition in error, so that the case stands here upon three bills of exceptions and three petitions in error, all in one case. Whether it was necessary to have so many bills of exceptions is perhaps a question; the bills are each a copy of the other.

The fundamental basis of the petition is, first, that the L. S. & M. S. Ry Co. was obliged, by virtue of the statutes, sec. 3284, to build, maintain and keep in repair a bridge at this point over the line of its road. The road was opened after the construction of the original bridge. Whether the keeping and maintaining of that bridge would come within the limits of that statute, is a question that is not urged here. There seems to have been some talk about it in the court below; but the court held—and that seems to have been acquiesced in here—held that inasmuch as the Lake Shore Company had assumed to build that bridge originally and keep and maintain it and had done so for a long period of time, that they were still liable for its maintenance and continuance. Under the decisions of the Supreme Court it is said that the

company is bound to maintain that bridge so long as it keeps and uses its franchise.

The liability of the City of Toledo, it is claimed, arises upon the fact that this bridge is within the limits of the City of Toledo and connecting one public street with another, and that the obligation rests with the city of Toledo to maintain and keep the streets and bridges in repair, open and free from nuisance.

As to the liability of the Ccn. St. Ry. Co., it is claimed to rest upon the fact that they were using this bridge and this street for the purpose of traveling over them a long time after they had knowledge that the bridge was in a defective and dangerous condition.

The evidence shows substantially this state of facts:

Sweeney, upon the morning upon which he received his injury was at the barns of the street railway company upon Cherry street and he went there to take his car; and while he was there he went to the person in charge of the barns, and who it is claimed had charge of the men, who sent them out and directed them when to go and how to go upon their cars, and told him that he had been informed by certain parties that the bridge over the Lake Shore road upon St. Clair street was out of order and was dangerous, and he asked that he might be excused from going out upon his car that day—lay off. The person in charge and the person to whom he applied—Pelton by name—told him that he had no other man; that if he had another man he would let him lay off, but he had no other man, and he would make some inquiries. Thereupon another person present, one of the employes of the company, Stahl by name, telephoned to Denman, who was the general superintendent, as I understand it, of the company, stating the facts in regard to the bridge and stating what this man wanted. He telephoned back that an examination had been made of that bridge, by the officers of the company, and that the bridge was in good condition and that he should

have no fear but to go ahead. Thereupon Sweeney got upon his car and, proceeded, Robert McMahon being the conductor of the car with him. McMahon's testimony is that Sweeney told him substantially what he had told the other parties; that some man said that the bridge was out of repair and he was going to speak about it; and after they started out and got up towards the bridge he told him to look at the bridge, and McMahon says that the bridge swayed and sagged five or six inches as they went over it; but they went on about their employment during the day and McMahon made no report of it to anybody and didn't seem to trouble his head about the matter.

Another witness testified—Stahl by name—and he was present at the barn and reported at the barn in the morning—that he was in the employ of the company between nine and ten o'clock of the evening before and came across this bridge, and as he was crossing the bridge he saw Mr. Denman upon the bridge and spoke to him about the bridge, that there had been something said about the bridge being out of repair, and asked him what he thought about it, and Denman said the bridge was good for a thousand—practically, that the bridge was all right, and he should go on. As he passed over the end of the bridge and came off, he saw Mr. Lang, the general manager, sitting in his buggy by a telegraph pole some 20 or 30 feet from the end of the bridge. He didn't speak to him but says he passed on down town.

About half-past six upon the evening of the 13th as these two cars were going over, as stated, the bridge fell and this plaintiff received his injury.

It is claimed on the part of the street railway company that all the information that they obtained in regard to this bridge was obtained through the plaintiff, Sweeney, and that if any liability exists on the part of the company towards him, he himself is chargeable with knowledge of the condition of the bridge at that time as fully and completely as

the defendant company. That is the claim as we understand it.

Now we cannot accept that view—or, we do not reach the same conclusion, rather in regard to the condition of matters. It would seem from the testimony of Mr. Pelton, that some parties before had made charges in regard to the condition of the bridge, because the plaintiff says that when he spoke to Pelton, Pelton said that some one had spoken to him before or that he had received such information before. But it was telephoned back that morning that an examination had been made of the bridge by the officer. It appears from the testimony of Stahl that Lang and Denman were in the vicinity of the bridge the evening before; but, for some unexplained reason, neither Mr. Lang nor Denman testified. There is no evidence of the examination which they did or did not make of the bridge that evening, nor was there any direct proof that the examination was made, other than the statement that was telephoned back by Denman. Some discussion was had before us in regard to the question as to whether there are sufficient allegations in the petition charging the defendant company—which is the Street Railway Company—with knowledge of the condition, that is to say whether they are charged in the petition with knowing these facts, or having the means of knowing them, and if I understand the statement correctly, that there was no allegations that the plaintiff was without knowledge. I may be mistaken on that point. We have examined the amended petition very carefully, and, while the petition might be drawn more clearly than it is, and with more care—which would have saved us a great deal of trouble in the matter—yet we think that a fair and just construction of that petition shows that these points and allegations are there, though it is complained that they are not there. It is not very clearly drawn, but we think a fair construction of it is sufficient to maintain the contention of the plaintiff below in that regard.

Now it is said that it was argued here,

that even if this statement was made to the plaintiff that morning by Pelton at the barns, that it is not pleaded as an estoppel, nor does it come within the definition of the rules of law laid down by the Supreme Court of this State which enables a party plaintiff to rely, after making complaint, upon the promise or statement of his employer as to what he will or will not do in regard to the work. We think the testimony was properly receivable and may properly be used and relied upon by both the jury and the court for the purpose of showing the circumstances under which the plaintiff went upon the bridge; and the testimony clearly shows that having received some information himself—he says, in his own testimony, having no knowledge in regard to the matter—that upon requesting to be relieved from going upon the road that day, he was told by his employers that there was no danger, that the bridge was in good condition. Now certainly that goes to the extent of his knowledge, it is testimony tending to show that he did or did not have knowledge of the condition of the bridge, and it is testimony that we think is entitled to go in evidence without being pleaded. He avers in the petition that he had no knowledge of this matter, and we are disposed to sustain his allegation, and the jury might rely upon it as showing that he had no knowledge of the bridge which would affect his right of recovery, or prevent his recovering.

We have read the decision of the Supreme Court cited in 49 O. S. Coal & Car Co. vs Norman, p 598, and have endeavored to give the matter full and careful examination and have discussed the matter; for there are other points made; for instance, the point that the Street Railroad Company had no right to repair this bridge because it was charged with no duty in regard to it; and that is said by the court below to be true; that is true, but we think the court below substantially put the ground of the plaintiff's liability in that regard upon the proper basis, and that is upon the question of negligence upon its part, whether it was

negligently using that track for the purpose of propelling its cars along it, when it had knowledge, or reasonable information or means of knowledge—of knowing that the bridge was not in a fit condition for the passage of cars over it. And we think, under the evidence, that the jury might well find, from the statements of the testimony, that they had knowledge such as would charge them with some duty to this plaintiff in regard to the passing of its cars over that road and in regard to the defective condition of the bridge at this time—of which we will speak a little later on.

In regard to the city of Toledo, the city, as I have already stated, by the statute is chargeable with the maintenance of the bridges of the city. Of course, there are questions which arose and which were discussed and upon which the court was asked to charge the jury, in substance, that the fact that the railway company had assumed—or the fact that it was bound to maintain and keep it up and in repair, did not relieve the city from its obligation, so far as the public was concerned and so far as the plaintiff is concerned, from its obligation to keep that bridge in proper repair and fit for travel, or else to prevent parties from passing over there.

It is alleged by counsel on behalf of the city that there was no contract liability between the city and the railway company; that the street railway company was a mere licensee upon the street; that the city merely gave it permission to propel its cars on the street; and they stated that the city was not bound to keep the bridge up or to keep the street in repair for that company to pass its cars over it, and if the company received any injury by reason of the defective condition of the street, or if its employees received any injury, there was no liability on the part of the city, no such obligation existing against it as gave a right of action against the city. We have examined these authorities and we are unable to concur with the counsel in the position which he seeks to maintain here. We think that

there was some obligation existing on behalf of the city and some contract liability—if we chose to use that form of language—but, at any rate, the same duty and the same liability upon a breach of duty that there would be if the driver of a public conveyance upon the street was injured by any negligence upon the part of the city not in keeping the street in repair.

Now, in regard to the liability of the city, the first knowledge that the city seems to have had in regard to this matter was this: That upon that morning the assistant engineer started to go up to the western part of the city, upon some work, and took the cars, and, in passing over the bridge he noticed that the bridge was swaying and yielding, and he immediately got off the car and proceeded to make an examination of the bridge; and during the course of the examination he found that one of the chords of the bridge—beams, I suppose he would call it—near the end of the bridge, was decayed—decayed at the end of the bridge. Upon that beam and resting upon an iron plate, were some of the supports of the bridge—I don't know what he calls those—but at any rate they are the base of a sort of an arch that up-hold, support and maintain the bridge; that while the timber, outside, appeared to be all right, it had become rotten in the center and had given way and the plate was shoved off, perhaps nearly six inches, and that had allowed this arch to lengthen and had materially weakened the bridge. Like a prudent officer that he was, he immediately went to a telephone and telephoned to the city engineer. The engineer himself was not in, but persons who were there were informed of the condition of affairs, and immediately upon the return of the engineer himself to the office he was informed of the condition of that bridge, in detail, it seems, and thereupon he turned around to the phone and telephoned to the engineer in charge of the Lake Shore railway, who it seems at that time was in the depot in this city—the offices of the railway company being there—and he told

the engineer of the Lake Shore company that this bridge was dangerous, that being the substance of the language which he used—was then in a dangerous condition—that such information had been received.

The engineer himself testifies that he received notice from the city engineer, using the language, first that the bridge was unsafe, and also repeated that the bridge was in an unsafe and dangerous condition, but neither of these parties were sufficiently alarmed about the matter, or exercised, to go any further, and seemed to have thought that the matter might rest along a little—that there was no immediate danger. And there the matter rested.

No steps were taken by the city engineer or authorities, no information given, no orders issued in regard to the matter, and this young assistant went on up and performed his labor and came back and had some conversation, I believe on his return, with the engineer, but nothing was said or done and the accident occurred that evening.

Now, so far as the city is concerned, we think there is a direct and clear liability on their part to the plaintiff also. The condition of the bridge as stated to the engineer ought to have been sufficient to have enabled any engineer to know that the bridge was certainly in a very unsafe and dangerous condition. He ought to have understood that more fully than any other person not a professional engineer; because it seems from the statements made by the engineers in regard to the bridge that the moment this piece gives way the whole superstructure is liable to fall. It loosened the arches and overcomes the strength of the chords, weakening the bridge beyond what an ordinary person would be apt to conceive, leaving it in a very dangerous condition, and the city had knowledge of the fact through its city engineer in abundant time to have closed the bridge, and they should have closed it to travel and kept people away from and off of it.

Coming down to the Lake Shore company, I had a little more doubt whether

there would be any liability on the part of the Lake Shore, no continuing liability on their part to keep up and maintain the bridge. They assume that it was the duty of the company to do that, under the statute. It seems that a bridge had been built—one or more—but at any rate the present structure had been put up in the year 1887, that is to say a new bridge had been put up. At that time there was in use, so far as street railways were concerned, only horse cars upon that road, electric cars not having been in use in the city, I believe, at that time. The bridge was built throughout of good material, by a competent bridge builder, under the charge, as was testified, of one of the best bridge builders in the state, a man who for 20 years superintended the business of the Lake Shore company in the construction, maintenance and preservation of its bridges. And that bridge had been examined regularly about every six months, the custom being to do that at about those periods. It was examined in the October previous, and that was done as was testified by the engineer of the company by examining it from end to end. If anything appears defective or indicates rot in the interior, they used augurs to bore in and examine it. Ordinarily they used an instrument like a heavy hammer or sledge, or something of that kind with a round head, constructed for the purpose, and it is said that upon striking a piece of timber that is decayed in the interior that it gives out a sound that a person accustomed to such work can tell whether that timber is rotten or not. It is said that in the fall an examination of the bridge was made thoroughly. This accident occurred in May following. The bridge had been sustaining a heavy amount of travel and traffic. There is some evidence tending to show that there was a large amount of travel on the 1st of May and two weeks previous at the time of the dedication or consecration of the Catholic church in the Fifth ward, when a very large number of people went up to attend the services, and that the company took over its electric cars and drew trailers, as they are called, being old horse cars, and very

heavily loaded—and whether that had any effect on the bridge, does not appear.

Now, upon this particular day, about 11 o'clock in the morning, Mr. Rockwell, the engineer of the Lake Shore company, was informed that this bridge was then in a very dangerous condition. He himself testifies that it was in a dangerous—or sometimes it is put as being in an unsafe condition; and the question was put to him as an engineer whether upon the facts stated by the assistant engineer of the city in his testimony—whether if the beam was rotten, whether if the iron plate had slid the distance it was said to have slid—some four or six inches—straightening out the arches, if that bridge was in a proper condition to be passed over by team or cars, and he says it ought to to have been closed immediately; that there was only one thing to be done as a matter of prudence, and that was to have closed the bridge. Now without making any inquiries of the city engineer as to what had been found there in regard to it—for nothing of that kind was communicated by the city engineer so far as the evidence discloses—he himself seems to have jumped to the conclusion that perhaps it was safe enough for a little while. He, however, immediately turned and telegraphed to the chief bridge builder at Cleveland, to give the matter attention. He said it would take the matter of a week to get the material together for the fixing of the bridge. He himself didn't go to see the condition of the bridge or make any examination of it at that time. Now it would seem that up to 11 o'clock that the Lake Shore road had not been derelict in making annual examination. It seems that the life of a bridge of that kind is for ten years or so, and this bridge had not been standing over about five years, and had been semi-annually examined and found in good condition; it seems that up to that time there had been no negligence upon the part of the railway company, as shown by the evidence, but, upon mature consideration, it does seem that upon knowledge being imparted to the engineer that a bridge of that kind was in a dangerous condition,

and then in an unsafe condition, a bridge that had been used to his knowledge for the transportation of electric street cars over it, over which a very large amount of travel was passing from day to day, that a proper sense of care in regard to the public and those who passed over the bridge, would have induced him to make some examination—*should* have induced him to have made some examination of that bridge for the purpose of ascertaining whether or not people should be allowed to pass over it. It is said, and there is force in the argument, that the railway company had no right to close that bridge; that the construction of the street and the control of the bridge was with the city authorities; which is true; nevertheless, they might have stationed parties there to give warning and to have protected the public from passing over the bridge, or it could have taken steps in connection with the city to have had the bridge closed; but I am inclined to the opinion myself, upon mature consideration, that there was a liability on the part of the company arising from the fact that the engineer himself did not take such steps, as a prudent engineer should have taken, to ascertain the condition of the bridge, he being but a little ways from it.

There is one other question that has been urged upon us, and that is this: that this verdict is *excessive*. The verdict was \$14,000. That is a pretty large sum of money, and of course it challenges the attention of the court in regard to the amount of it. Our attention, of course, has been called to this by counsel in argument.

It is a very difficult matter to ascertain, in some of these personal injury cases, the amount of judgment that should be awarded or that may be awarded. This plaintiff is not far from 25 years of age; he is a man that was in good health prior to this time. He was earning about \$1.80 a day. We presume he could have continued to earn that amount; we don't know whether he would have developed into a man of business or not. He has been injured. Now if he were a well man and getting \$1.80 per day the court

could come to some pretty definite conclusion what his services at that price would be worth during the balance of his life. If he had met the fate of Mammatt, the motorman on the other car, and had been killed, and then suit were brought under the statute we could arrive at some definite result as to the value of his services by the use of tables calculated for that purpose. The evidence in regard to his physical condition rests of course upon his testimony, and very largely upon the testimony of two physicians and surgeons. One is Dr. Woods and the other Dr. Wright; and the testimony of these surgeons concurs in showing that this man has received very severe injuries, which seem to affect seriously his spine and kidneys, and perhaps other portions of his body. It is also a fact that according to their testimony he will never be any better, and that he will never be able to work. His personal appearance at the present time indicates that he is a man who is in a very bad condition physically. The testimony of these physicians we must rely upon as a matter of course. The one we know to be a very able surgeon; the other is a very large practitioner, and I don't know but he has a large amount of experience as a surgeon also, and we are bound to take this evidence as showing what the future prospects of this plaintiff are; that is to be an invalid, unable to work and suffering. In some respects his disease is of such a nature that it is offensive to all persons about him, as the result of his injuries. The prospects are that he will be compelled to employ physicians, and he may be compelled to employ assistants before he is through life to take care of him. He will be a sufferer physically and will go down to his grave with a feeling that life is not a very pleasant one at any rate, that he is a permanent cripple and all his life will be oppressed with that physical condition. Now it is very difficult to state what would be a fair compensation or to establish any permanent rule that could be followed. He should be awarded that which will give him at least the means of a livelihood as fully and completely as he would be able to earn if he were well; it

should be sufficient to minister to his personal comforts as long as he lives, and furnish him with medical aid and clothes and things which he may need. If there is anything beyond that, the physical suffering and the pain which he will endure, the humiliation and the real burden which is upon the man's mind and which will follow him all his life, are to be considered. Now, after taking all these matters into consideration and looking the ground over, we are unable to say that the jury erred or rendered a verdict here which is excessive, through either prejudice or passion or appearing to be under the influence of passion or prejudice. Indeed we are unable to say that the verdict is excessive in itself, and therefore we decline to disturb the amount which has been rendered by the jury.

Judgment of the Common Pleas affirmed, without penalty.

Construction of Contract.

713—Alva Austin vs Albert L. Smith. The defendant in error sued the plaintiff in error before a justice of the peace for a balance alleged to be due him for salary and commissions for selling sewing machines. There was a contract between the parties, made up by using a printed blank which was prepared originally to be used for a somewhat different purpose, and filling in and altering the same for the purpose of these parties; this resulted in a want of clearness in certain of the terms of the contract. By this contract Smith was constituted the agent of Austin to sell sewing machines for him in Toledo, and in said contract is the following provision: "Said second party (Smith) shall receive the following salary and commissions for all sales made—a salary of \$6 a week with a guarantee of at least one good sale of a new machine each week. If there is no sale made, there is no salary to be paid, and a commission of \$5 on each sale made. Said second party is to have the first \$5 paid on sales made from his soliciting."

The employment under this contract lasted several months, and during some

weeks Smith made several sales, and during others he made none; but taking the total number of sales made and the whole number of weeks employed, an average of more than one sale a week was made. Almost every week Austin made payments to Smith of small sums of money and took receipts therefor, a sample whereof is as follows:

"TOLEDO, OHIO, Feb. 28th, 1891.

"Received of A. Austin six dollars, salary in full to date.

"\$6.00. (Signed) A. L. SMITH.

These receipts were given in evidence in the trial. Some of them also stated that they were in full for commissions on certain designated sales.

The Court of Common Pleas charged the jury in substance that said salary was to be paid for each week of the employment if on an average for the whole time there was a sale a week, although during some weeks there may have been no sale.

Held by the Circuit Court, that this construction of the contract was erroneous, and that during weeks wherein no sale was made no salary was earned. The Court of Common Pleas also charged the jury at the request of the plaintiff below: "That a receipt reading 'in full' in which an amount is also stated, is to be taken as a receipt for the amount only, unless it be further proved by other testimony that there was, in fact, a settlement in full." And also gave other instructions to a similar effect; that words written in a receipt signed by the party are no admissions of that party of the facts thereby stated, unless evidence *aliunde* the receipt is given showing that such words were put in purposely by the signer, or were known to him, or that the fact recited in the receipt existed.

Held by the Circuit Court, that these instructions were erroneous, and the judgment should be reversed. The verdict is set aside and the cause remanded for a new trial.

Subscriptions should be addressed to the TOLEDO LEGAL NEWS CO., Toledo, O., and accompanied by remittance by draft or P. O. money order. Subscribe for the LEGAL NEWS for three months any way. At the expiration of that time you will renew your subscription for a year.

Supreme Court.

TUESDAY, March 13, 1894.

General Docket.

3569—The Cincinnati, Hamilton and Dayton Railroad Company vs. Frank Margrat. Error to the Circuit Court of Lucas county.

BRADBURY, J.

1. An engineer in charge of a locomotive on one train of cars of a railroad company is in a branch or a department of its service, separate from that of a brakeman on another train of the same company within the meaning of the terms "separate branch or department," as those terms are employed in section 3, of the act of April 1, 1890, 87 Ohio laws, 150.

2. An engineer in charge of a locomotive, who has authority to direct or control a fireman serving on the same locomotive, is a "superior" within the meaning of the above named section.

3. Whether an engineer, or other employe, of a railroad company, has authority to direct or control other employes of the same company, is a question of fact to be determined in each case. This may be done, however, either by proof of express authority, or by showing the exercise of such authority to be customary, or according to the usual course of conducting the business of the particular company interested, or of railroad companies generally.

Judgment affirmed.

NOTICE.

We are obliged, owing to the lack of space, to omit Supreme Court decisions handed down this week but will publish the same in our next issue, and hereafter they will appear more promptly.

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SATURDAY, MAY 5, 1894.

SEVERAL IMPORTANT MATTERS.

Our somewhat sanguinary expectations concerning the success of a weekly edition of the TOLEDO LEGAL NEWS, are being very encouragingly realized from day to day. We have little doubt, now, of being able to place the weekly upon the same secure footing that our daily paper secured in such a remarkably short space of time. The field offers an abundant harvest of legal knowledge; more than sufficient, it seems to us, for the publication of a law journal which will be of inestimable value to the profession. And one which will be a financial success to its publishers.

Apropos of this latter consideration we recall suggestions which some of our friends, members of the Toledo bar, have made. Several have said, very rashly indeed, "You should charge \$5.00 per year for the weekly, that is little enough." Perhaps this is true, but to those who think so we have to say, let not your conscience be troubled. We have counted the cost and believe that \$3.00 per year is a fair price and one which will afford reasonable compensation for the investment of money, time and ability. We have a successful daily paper (also a law journal) behind the weekly. In publishing the two we are able to offer more, for the money, than either could afford if conducted independently.

We make this explanation for the benefit of those who are not subscribers to our daily paper and who have little knowledge of our business or financial standing. We have sufficient capital; we have a plant completely equipped and unencumbered,

either with age or debts; our facilities for doing good work are all that could be desired and in order to employ them all we limit the price of our paper to a reasonable figure.

We would prefer to receive a certain sum from a large number of subscribers than the same amount from one-half or one-third the number, and in order to come as near as possible to reaching every practicing attorney in Ohio, we intend to offer in value to practitioners many times the amount of our subscription price. Once so successful in the number of subscribers, the character of the LEGAL NEWS will be rigidly maintained.

We are, as rapidly as possible, completing arrangements throughout the State to secure important and interesting decisions from Common Pleas Judges in the various counties. Such information belongs to the special mission of the LEGAL NEWS, which is to secure, and put in form for binding, the decisions of able jurists throughout Ohio which have heretofore been lost to all except a few members of the bar. If the weekly edition of the LEGAL NEWS is a success, and that would seem to be a foregone conclusion, its subscribers will have the benefit of the thoughts of such judicial talent as there is in Ohio. They will secure, carefully prepared and in form for binding, the important additions to the *lex non scripta* which every day is making either on Circuit or Common Pleas benches. And in addition thereto, be kept informed concerning Federal and Supreme Court cases.

The importance of the work we have undertaken is entitled to much consideration. While we will cover Supreme Court proceedings, publishing the syllabus in all reported cases and frequently the decisions in full, our attention will be directed specially toward the publication of decisions heretofore practically lost to the profession, viz: decisions of the 6th Judicial Circuit Court in all of the eight counties comprising the district. We have arranged to secure them

regularly and they will be published as promptly as it is possible to prepare and have them revised by the judges. These alone will be worth more than the price of our paper to every lawyer, but we add a vast amount of important news from different parts of the State and many important decisions in other States.

TELEPHONE COMMUNICATIONS.

As appears in another column, the decision of the Supreme Court of New York, General Term, opinion by Follett, J., reversing an order vacating an attachment based on an affidavit of an attorney who gave as the source of his information, a telephone communication with plaintiff's attorney, has been reversed by the Court of Appeals, opinion by Justice Gray.

As might have been expected, however, the decision rather extends than limits the principle, followed by Justice Follett. The Court of Appeals goes farther in recognizing the merits of the telephone service, reversing Justice Follett's decision simply because the affidavit did not indicate that affiant, in communicating with plaintiff's attorney through the telephone, had, in some way, satisfied himself that he was talking with the party required to furnish the information.

U. S. Circuit Court.

Order for drawing petit jurors for June term: Graff M. Acklin, Tol; Geo. L. Johnson and Garrett Burns, Tol; Alonzo Conant, Van Wert; Jacob Varnier, Archibald; C. B. Squires, Defiance; Marcus V. Barber, Tol; Frank Knowles, Fostoria; E. J. Therwichter, Oak Harbor; C. J. J. Machen, Tol; R. H. Bever, Tiffin; Geo. Daniel, Sandusky; Thos. D. Preddy, Middle Point; Andrew J. Manville, Bowling Green; Geo. C. Stahl, Tol; Geo. Sinnsmon, Clyde; Chas. L. Allen, Fayette;

Wm. C. Corlett, West Unity; Aaron Barnet, No. Balto; John W. Lee, Norwalk; John B. Larioses, Mark Center; J. G. Metsch, Elmore; John Polson, Napoleon; Wm. Harmon, Attica.

Common Pleas Courts OF OHIO.

The following are among the important and interesting decisions of a recent date.

93—Paul Raymond vs Henry C. Breckenridge, Warren C. Breckenridge and Julia S. Manahan. Motion to strike out second defence of Julia S. Manahan because the same is irrelevant and redundant.

LEMMON, J.

The petition counts upon a judgment heretofore rendered in the Court of Common Pleas of Lucas county at the April term A. D. 1879, in favor of plaintiff and against each of the defendants and the petition proceeds to aver certain payments made on said judgment—the amount that still remains due and unpaid thereon and asks that plaintiff may recover thereon the amount so remaining unpaid against each and every of the defendants.

The defendant, Julia S. Manahan, files a separate answer to the action; and for a second defence she avers that she was a married woman and as such was a member of a co-partnership with the other defendants engaged in carrying on a hardware business in Lucas county, O., under the firm name of Breckenridge & Co.; that said co-partnership in conducting its said business became indebted to plaintiff and gave to plaintiff promissory notes to secure such indebtedness; that she at no time took any active part in the business of said firm; that she did not sign said notes or have any knowledge of their existence or the existence of such indebtedness until after the bringing of such action and that at no time did she have any intention to charge her separate estate with the payment of said debts and that she had no separate property or estate except her interest in said co-partnership; that all of the property of said firm was sold under the orders of this court procured by plaintiff and the proceeds thereof was appropriated toward the payment of plaintiff's judgment and she says that by such sale her separate estate and all property which she then owned was used in paying

plaintiff's claim and that she is not now and has not since been the owner of any separate estate or property.

Plaintiff, in support of his motion to strike out claims that these matters are *irrelevant and redundant* because, he alleges, that if such matters constitute a defence to plaintiff's action they might have been set up in said former action and that because they were not defendant Manahan must be held to have waived such defence; and that the judgment of this court rendered at the April term, 1879, must be held against each defendant conclusive as to matters then adjudicated and all matters which defendants might have presented for adjudication.

In answer to this it was said that the judgment in this case was not a personal judgment as against defendant Manahan but a judgment as to her against her separate estate in said co-partnership and the case of *Avery vs Vansickle* 35 O. S. 270, 273 and 275 is relied upon as sustaining such position.

The motion to strike out the 2d defence from the separate answer of Mrs. Manahan is overruled.

The case of *Avery vs Vansickle* was decided after the statute of March 30th, 1874, authorizing actions by and against married women was in force. That statute has been in force substantially in terms as it now reads during the proceedings referred to in the pleadings of the parties hereto, Sec. 5319, Revised Statutes, which contains the Statute of March 30, 1874 reads as follows: "When a married woman sues or is sued like proceedings shall be had and judgment rendered and enforced as if she were unmarried, and her property and estate shall be liable for the judgment against her, but she shall be entitled to the benefits of all exemptions of heads of families."

The act of 1874, page 47, says that where a married woman is "engaged as owner or partner in any mercantile or other business and the cause of action grows out of or concerns such business, she may sue or be sued alone. And in all cases where she may sue or be sued

alone the like proceedings shall be had and the like judgment rendered and enforced in all respects as if she were an unmarried woman, and in every case her separate property and estate shall be liable for any judgment rendered therein against her, to the same extent as would the property of her husband were the judgment rendered against him."

Notwithstanding the *at first sight* sweeping clauses of these statutes the Supreme Court in *Avery vs VanSickle*, say page 273, "in the case of *Allison vs Porter*, 29 O. S. 136 it was held that the statute last above set forth did not create a new cause of action in favor of or against a married woman where none existed before, but that the statute as amended was intended to prescribe the cases in which she may sue or be sued alone, authorizing in such suits like proceedings and judgments, and like enforcement in all respects as if she were sole." * * *

"Before a judgment can be taken against her on her promissory note, it must appear that she had a separate estate to charge with its payment and that she intended to so charge it at the time she executed the note—and they add, *these questions are clearly for the Court.*"

Page 273, "It is true that the note in form is joint, and a judgment upon it were the plaintiff discover and consequently liable thereon at law, would within the authorities, constitute a complete bar to a subsequent action thereon. A joint obligation where the obligors are *all bound at law* creates but one debt, and where a judgment is entered upon it whether against all or only a part of the obligors all further remedy is merged in the higher security.

Page 375, "But in the present case the makers of the note were not in a legal sense jointly liable thereon. No obligation was created against the wife which could be enforced at law, hence a joint remedy could not have been anticipated when the note was executed. * * *

The husband was alone liable on the note, or he was liable jointly with the wife's separate estate against which the

remedy was wholly in equity while the liability was strictly legal."

Following the line of thought thus put forth by the Supreme Court, it would seem that nothing could be claimed as against a married woman from the obligation and effect of a judgment against her other than that it bound her separate estate, then owned by her, and hence when such separate estate was wholly exhausted in proceedings enforcing such judgment farther remedy against her could not be had.

CRIMINAL PRACTICE.

A Burglars Outfit Evidence Which May be Considered as Indicating a Combination of Criminals.

James Flavel, known as "The Rat," James Proctor and a man named Jackson were arrested on a Michigan Central train just entering Toledo. Flavel and Proctor are notorious criminals. The former pleaded guilty and Proctor entered a plea of not guilty.

On his trial, for having burglars tools in his possession, after testimony for the State was concluded, defendant's attorney moved to arrest the case from the jury on the ground that there was no evidence showing or tending to show that the defendant had any thing to do with the burglars tools or was in any way connected with Flavel at the time of his arrest.

LEMMON, J.

The evidence indicated that Flavel, Proctor, the defendant, and Jackson boarded the train for Toledo at the same station; that Flavel entered the car and took a seat on one side of the car, toward the forward end; that he carried on his shoulder the valise containing the burglars tools and placed the same in the rack over the seat he occupied. Proctor, the defendant, followed Flavel into the car but took a seat on the opposite side of the car, nearer the center. Jackson followed and took a seat next in rear of the one occupied by Flavel.

The evidence also showed that Flavel

and Proctor had been companions at other times and other places; that they were seen together once or twice in disreputable houses.

The burglars tools, including safe blowing to ls, constitute an outfit which would require a combination of individuals to handle in the work which the tools were intended to perform.

Held by the Court. That without going further into the evidence there appeared to be enough to warrant allowing the jury to determine whether or not the defendant was an accomplice of Flavel's.

Motion overruled.

(The defendant then withdrew his plea of not guilty and pleaded guilty.)

KILLING A DOG.

Failure of Proof to Establish Negligence on the Part of the Street Railway Co.

34067 Jos. A. Baumgardner vs The Tol. Electric Street Railway Co. Action to recover for the death of a valuable dog, killed by an electric street railway car.

HARMON, J.

The petition alleges that plaintiff was the owner of a valuable dog; that the dog had strayed from the place where he was kept; that he got out without the fault or negligence of plaintiff and was on Bancroft street, a short distance east of where Putnam street crosses said Bancroft street, when defendant's car approached from the east at a high and dangerous rate of speed; that defendant's employees in charge of said car gave no attention to said dog; gave no alarm; that they did not check the speed of the car at all, but ran it so rapidly, carelessly and negligently that it struck the dog and killed him.

The proof showed that the dog was a thoroughbred Llewelyn setter. The plaintiff's evidence also showed that as the car approached the dog was lying on the north side of Bancroft street about four or five feet south of the curbstone, between the curbstone and the north rail of the street car track. One witness sworn that the car was going *pretty fast*; another that it was going *very fast*. As the car approached, the dog started to go south a-

cross the track and was struck by the car and carried nearly to the middle of the next square when some one in the street called the attention of the men on the car to the dog, when they stopped the car and the dog was taken out dead.

When plaintiff closed his case defendant's attorney moved the Court to direct the jury to return a verdict for defendant.

THE COURT HELD, that the evidence that the car was going *pretty fast* or *very fast* did not tend to prove that the car was being driven at an unlawful, negligent or dangerous rate of speed and that there was no evidence tending to prove negligence on the part of defendant's employees in the management of the car.

Motion granted and jury directed to return a verdict for defendants.

USURIOUS CONTRACTS.

Upholding the Laws of another State.

34250—Omaha L & T Co. vs Josiah H. Bellows. Action to recover balance claimed on bond or obligation entered into by defendant with Omaha Loan & Trust Co. Trial to a Jury.

Petition set out amount, about \$640, which plaintiff claimed as balance due on the bond. Defendant answered, admitting the making of the obligation but averring that whilst the bond acknowledged the receipt of \$5000 defendant at the same time paid to plaintiff \$150 Cash. This was denied by plaintiff.

Court (LEMMON, J.) instructed the jury that the laws of Nebraska, it being also admitted by Counsel, were necessarily a part of the contract and that as under the laws of that state persons borrowing money are permitted to enter into contracts for the payment of 10 per cent interest the verdict must be determined by the finding of fact relative to payment of the \$150 bonus or commission. If they found from the testimony that defendant did not pay to plaintiff, or any one for it, plaintiff should be given a verdict for the full amount of its claim. If, on the contrary, they found the fact to be that defendant paid said sum to the plaintiff or any person for plaintiff, their verdict should be for the defendant, as, under the law of Nebraska, where contracts for more than 10 per cent interest are made a penalty is inflicted upon the party seeking to enforce such contracts to the extent of denying him the right to recover any interest whatever and it was conceded by Counsel that if no interest was allowed there would be nothing due from defendant to plaintiff. Verdict for defendant.

In Other States.

Laidlaw vs. Sage.

One of the most interesting cases of recent date, in the line of personal injury suits, is that of Laidlaw vs Sage, recently tried in New York City a second time. The plaintiff was a clerk in Russell Sage's office at the time when Norcross, accompanied by a bomb, undertook to extract a million or two from Mr. Sage. The result is well known. Norcross exploded the bomb and was instantly killed. Mr Sage was considerably shaken up, and Laidlaw very severely injured. He brought suit against his many-times-a-millionaire employer, claiming the latter used him as a screen from Norcross and his bomb.

Referring to the legal aspects of the case the New York Law Journal says:

Appropos of the second trial of this case, it may be proper to remark that substantially all the comments in legal periodicals throughout the country, upon the General Term opinion filed in December last, approved of the general theory of the action therein set forth.

Upon plaintiff's own evidence which, of course, had to be taken as true on a motion for a non-suit, it certainly appeared that the defendant's deliberate act was instrumental in causing plaintiff to sustain the particular injuries proved. He might have received other injuries if let alone, but this of course would be more or less a matter of inference or even conjecture. The plaintiff proved certain injuries and defendant's active agency as matter of fact, and this technically made out a *prima facie* case. Such position is surely in accord with common sense and practical justice, because, if it were difficult to adduce any positive evidence on the question whether or not plaintiff would have sustained as great injuries if let alone, this *onus probandi* ought to rest on the wrong-doer as matter of defense against his liability for the trespass.

The Squib case and kindred authorities were urged by counsel for defense on the argument of the appeal at the General Term, but, upon the present trial, it was

borne out that the facts tended to show a rapid exercise of the reasoning faculty, rather than purely impulsive action; and this contention was to a large extent conceded by the theory of justification advanced. This branch of the case was referred to and very satisfactorily disposed of by Judge Patterson in his charge to the jury.

"Upon the part of the defendant, the theory is that the defendant is exempt from liability for the reason that he did nothing which would expose him to a pecuniary liability, because he acted in such a manner under the circumstances as would be justified by the law of nature and in the way of self preservation. There are cases in which even aggression, such as it is claimed took place here, might excuse a man from yielding to the impulse of nature for self preservation but that would be in a case in which it was clearly proven that without such act the person who resorted to it would probably lose his life. An illustration of the matter familiar to all lawyers is where in a ship-wreck two people have but one plank, which is insufficient to support both, and one of them throws the other off and he is drowned. Under such circumstances the personal representatives of the deceased, it is said, would have no action against the survivor. That is an extreme illustration. There are other illustrations of cases in which men may protect themselves at the peril of others, without being subject to an action for damages, and where there is no injury in a legal sense. But they are all cases in which it must be distinctly proven that without the act the person who commits it would probably have been destroyed or be in deadly peril. The distinction in this case is, that there is no evidence to show that without the act claimed to have been committed by Mr. Sage, he would have been exposed to any greater peril than that to which he was already exposed; and for that reason this case does not come within the category of the authorities to which I suppose counsel for the defendant intended to refer, which hold that a person may, at the risk of put-

ting another's in jeopardy, endeavor to save his own life. Therefore, you will exclude from the case any considerations which may have entered your minds upon that subject. It is not a clear case raising the abstract question referred to as the proof stands."

Judge Patterson then defined the real issue to be determined under the law as laid down by the General Term:

"Now let us take up the case upon the two theories which are asserted. The first is the commission of a trespass or a wrong on the part of the defendant, Mr. Sage, in applying force, no matter how great or slight, to the person of Mr. Laidlaw, and using him as a barrier to prevent injury to Mr. Sage. That is the theory of plaintiff's case; that Mr. Sage did thus use the plaintiff, and that he put him before him as a wall, as it were, to protect him from the effects of what had been threatened by this man Norcross. On this issue the burden of proof is upon the plaintiff. He is obliged to show, as matter of fact, affirmatively and to your satisfaction that Mr. Sage did these acts which the plaintiff alleges constituted the wrong out of which the action arose. Upon that subject the testimony divides itself, as you see very readily, into two kinds or species. The first is the testimony of witnesses with reference to what they saw and heard, and the second is circumstantial evidence with reference to what was done or happened on that occasion. By the decision of the General Term of this Court the burden of proof has been cast upon the defendant to show that the injuries of Laidlaw would have been as serious as they were if he had not been interfered with, and in order that there may be no misunderstanding as to that I will read from the opinion. 'We fail to conceive why the burden of proof is not upon the defendant rather than upon the plaintiff, to show that without defendant's acts the plaintiff would have been equally injured, and it seems to us that that is where the fallacy of the defendant's argument lies.' * * * 'The defendant assuming the responsibility of proof, which is declared by the General

Term opinion to be the law of the case, claims that from all the circumstances and all the surroundings of the case, from the peculiar nature of the accident, the position in which plaintiff stood, even if he were not removed, and of the act of Norcross, it is apparent that Mr. Laidlaw would have been injured just as severely as he was injured. On the other hand, it is claimed that the testimony shows that he was injured in those places where he might not have been injured but for the fact of his standing in front of Mr. Sage, because Mr. Sage was not injured in the places which Mr. Laidlaw said he was covering, and that circumstance you may refer to also as being in the case. I repeat, the burden of proof is upon the defendant to show that Mr. Laidlaw was not more seriously injured than he would have been had he not been used in the way in which it is claimed Mr. Sage used him, provided you find that Mr. Sage did commit the act of aggression which constituted the alleged wrong.

Both trials of the case attracted much attention. Some of the entertaining features of the last one appear in the following extracts from the New York World;

In the afternoon there were many distinguished lawyers in court. Upon the bench with Justice Patterson were Justice Peckham, of the Court of Appeals, and Justice Russell, of the Supreme Court. Ex-Judge Dillon and Ex-Judge Noah Davis, who have spent little time in court, were at the lawyers' table. Before the court opened Mr. Choate was busy reading a Bible. He started in his summing up by saying that the case was so plain that the jury had no right to disagree.

"You all know the story of David and Goliath. I want to read you four verses of that story from the book we all revere."

Mr. Choate took up the Bible and read from the seventeenth chapter of I. Samuel,

And it came to pass, when the Philistine arose, and came and drew nigh to meet David, that David hastened and

ran toward the army to meet the Philistine.

And David put his hand in his bag, and took thence a stone, and slang it, and smote the Philistine in his forehead, that the stone sank into his forehead; and he fell upon his face to the earth.

So David prevailed over the Philistine with a sling and with a stone, and smote the Philistine, and slew him; but there was no sword in the hand of David.

Therefore David ran, and stood upon the Philistine, and took his sword, and drew it out of the sheath thereof, and slew him, and cut off his head therewith. And when the Philistines saw their champion was dead, they fled.

"In this trial," Mr. Choate went on, "I represent David, and my friend represents Goliath. My Client is stripped of his arms. Before the fight he had no weapon except a little smooth stone in a sling, and that stone is proof which will bring down any giant on earth. He has no sword save the verdict to cut off the head of the giant.

* * * * *

MR. SAGE'S MEMORY.

"He came out of that dreadful experience substantially uninjured," continued Mr. Choate, "You have Dr. Munn's testimony for that. You have heard that the drums of his ear were broken by the concussion. I naturally supposed that his hearing was affected. I asked the first three questions in the softest, the lowest tone of which my voice is capable, and yet he heard me as distinctively as if I had spoken with the trumpet of the Angel Gabriel. Mr. Sage is a wonderfully active man for his years, yet his memory is frightfully impaired. You all know how he has spent his life, piling up gold until he has become one of the three great powers in this city. His mind centered upon that from morning until evening. Probably it occupied his dreams from evening until morning. And yet he couldn't remember within \$200,000 of the amount of a particular kind of bonds he had on Dec. 4. Why, that makes him smile as he sits there. He can hardly conceal the laugh in his sleeve. Don't

you think you'd remember the day you had \$200,000 worth of Missouri Pacific collateral trust bonds? I should remember it as long as I lived. If a man owed you \$200,000 don't you think you'd remember it? I think you could. What do you think of that memory? This case depends upon the memory of what occurred three or four minutes before the explosion."

The lawyer drew a vivid picture of Mr. Sage confronting Norcross. He asked the jury to picture in their minds how they would feel in such a position. Then he went on.

"This meant more to Sage than it could to any one else. He had so much more to leave behind. It didn't matter whether he had ten, twenty, thirty, fifty millions, he had to leave it all behind. This represented the labor of his life: the millions are his one great thing, his pride, his glory. Do you think any one could calmly, coolly and quietly remember what took place under such circumstances as those in which Sage was placed? There was that wild beast of a Norcross before him demanding his millions. No man would be capable of observation or remembering anything except the madman before him."

"I give Sage the credit of desiring to tell the truth, although I don't believe the life he has led can have any effect but to blunt his moral senses somewhat. You know his record. You know that he has been engaged in one benevolent scheme, that of promoting puts and calls to benefit his customers."

"There was another witness who wasn't called. Mr. Sage is a man of great resources. He tells a man to go and he goes, to come and he comes, to testify and he testifies. They had this man James in Mr. Sage's private office at a desk. Now this diagram of which you have heard so much was prepared for use in the former trial. It was so arranged that Mr. James could sit at Mr. Sage's desk and see all that happened just before the explosion. The engineer who made this plan drew it as he was directed, but unfortunately the railing would have run through the door and that would have destroyed Mr. James."

"They altered the plan, moved the desk, pushed the door back, but they were afraid to use it, and afraid to use Mr. James. This bears a little bit on the credibility of this aged financier. When evidence is manipulated it becomes very dangerous, and it will prove so to him, I think."

THEIR INJURIES COMPARED.

The injuries suffered by Mr. Sage and Laidlaw were compared. Those received

by the former were described as mere scratches made by fibres of wood and small particles, while those received by Laidlaw were like gunshot wounds. Laidlaw said that the force of the explosion hurled them across the room, and that he fell upon Sage's body.

"Sage tells you that he didn't move from the spot where he was standing, but graphically describes that he gently, gently subsided. He must be a stolid old fellow if that didn't move him. It moved everything else about there. It tore a hole in the floor. It hurled a safe half way across the next room. It tore out the partition. But Sage was so solid, so conservative, so heavy, that it didn't move him. He didn't even sit down with a bump, gentlemen, not even with a bump, but just settled gently down. You remember that Sage was unconscious a part of the time. How much more probable, how much more real is Laidlaw's story. He says they were blown towards the window in the direction that everything else was blown, and that is exactly what occurred."

LAILAW DESERVES A FORTUNE.

Mr. Choate suggested what he thought the jury would have done under circumstances following the explosion. He confidently expressed the belief that they would have sent Laidlaw a handsome check. He looked at Mr. Sage while he was speaking and the latter's mouth drew down in a strange smile. Then Mr. Choate took up the question of damages. He described the terrible injuries which Laidlaw had received and asked them whether they would be willing to suffer as he had suffered, to be maimed for life as he was maimed, for \$50,000. Above all, he impressed upon the jury the necessity for reaching a verdict, no matter how large or small the amount of damages awarded, or even if they found for the defendant.

"Don't," he said, "let the appalling spectacle go out to the community that a jury in a case where Russell Sage was the defendant could not agree. This man Sage has forty millions of dollars on his side. Oh, it is hard to get verdicts against men who have so many millions. I know, for I have tried it again and again. Owing to some subtle motive in the human mind which no one can explain, there is always one man on the jury who would rather lean towards a Russell Sage than a poor devil like my client here."

The jury was out one hour and five minutes, returning a verdict in favor of the plaintiff for \$25,000. Two jurors held out for the full some of \$50,000 but compromised on the amount returned.

TELEPHONE COMMUNICATIONS.

Identification of Party in Interest, as by Recognizing His Voice, Must be Shown, When Communications by Telephone are Relied Upon.

Court of Appeals.

NEW YORK, April, 1894.

Charles S. Murphy, respondent, vs William C. Jacklet al., appellants.

This action was brought to recover for goods sold and delivered by plaintiff to defendants. The complaint was on information and belief and was verified by one of the plaintiff's attorneys, who, in the verification, stated the reason for his making it to be the absence of the plaintiff in Massachusetts, and that his belief was based upon the statements made to him by the plaintiff and by his Boston attorney. Accompanying the complaint, and sworn to upon the same day, was an affidavit by the same attorney, in which he stated that as he was informed and believed, the plaintiff was entitled to recover the sum claimed as damages for the breach of an express contract, over and above all counterclaims known to the plaintiff, upon a cause of action existing in his favor against the said defendants upon the facts set out in the annexed complaint and that, as deponent was informed and believed, the said defendants are not residents of the state of New York, but that both reside at Gardiner, in the state of Maine. The affidavit then proceeds to state that the "deponent's belief as to facts above stated" is based upon statements of the plaintiff and the plaintiff's Boston attorney, "who have both talked to deponent this morning over the telephone from Boston," and that "they narrated the facts to deponent exactly as they have been set forth in the complaint, etc." The affiant asked for an attachment, "without waiting for affidavits to be obtained from Boston;" upon the ground that the property was "likely to be removed." A warrant of attachment having been issued upon the complaint and affidavit, an application to vacate it was granted.

Upon appeal to the General Term, the order vacating the attachment was reversed and the attachment reinstated. The defendants now appeal to this Court.

Henry D. Hotchkiss and William S. Maddox for appellants; Sullivan & Cromwell and Edward B. Hill for respondent.

GRAY, J.

If the affidavit was insufficient, upon which this attachment was ordered, a question of law is presented and the order of the General Term is undoubtedly reviewable here (*Allen vs Meyer*, 73 N. Y., 1; *Steuben County Bank vs Alberger*, 78 Id., 252). In this case the writ was applied for upon statements made upon the information and belief of the deponent, and the question is whether the information concerning the material facts, appeared to have been acquired in such a manner as to justify the Judge in acting upon it. Was the source of the information such as the Judge could accept as satisfactory? The affiant, in such cases, is not required to have a personal knowledge of the facts required to be stated; but it is essential that his information must appear to have been competently derived; as otherwise the judicial officer, whose action has been invoked, is without jurisdiction to proceed. It is clear that the attorney in this case obtained his information by a communication made through the telephone upon the morning of the day upon which the complaint and affidavit were sworn to, and that his belief was based upon it, in making his statements concerning the facts constituting the cause of action, the absence of counterclaims, and the non-residence of the defendants. Those were the material facts required to be proved to the satisfaction of the Judge, and we do not think that the proof as to the source of the information concerning them was sufficient, for the reason that there was lacking any degree of certainty that the plaintiff himself ever made the communication to the affiant. There would be no objection to the information having been conveyed through the medium of the telephone, if it had been made to appear that the affiant was ac-

quainted with the plaintiff and recognized his voice, or if it had appeared in some satisfactory way that he knew it was the plaintiff who was speaking with him. None of these facts, however, were averred. There was absolutely nothing upon which the Judge could pass to show that it was the plaintiff who was speaking and not some undisclosed person who, in the plaintiff's name, furnished to the attorney the information made use of. The perfection to which the invention of the telephone has been brought has immensely facilitated the inter-communication of individuals at distant points, and inasmuch as the voice of the speaker is heard, in most, if not in all cases, the identification of the speaker should be possible. The very facility of communication and of identification permits, and, therefore, imposes a duty upon the party who invokes judicial action upon the strength of information so received, to state his knowledge or his grounds for believing that it actually came from the party required to furnish it. To authorize an attachment to issue upon the affidavit furnished here was in disregard of the rule which requires that the source of information shall be disclosed in such a way as to enable the Court to decide upon the probable truth of the statements and the authenticity of the jurisdictional facts. Judicial action upon such a source of information as was here disclosed was justified below by analogy with telegraphic communications. The analogy is incomplete. If the information comes through the telephone, it is quite possible to identify the speaker. Then, too, there is not, in the case of a telephonic communication, any record, like the message which, in the case of the use of the telegraph, remains for reference and verification.

For these reasons, as well as for those stated in the opinion of Mr. Justice Barrett, at Special Term, and of Mr. Justice Van Brunt, dissenting at the General Term, the order of the General Term should be reversed and that of the Special Term should be affirmed, with costs in all the Courts.

All concur.

Ordered accordingly.—N. Y. Law Journal.

CONSTRUCTION OF WILL.

Legacies Held an Equitable Lien and Changeable on Land.

Supreme Court—Special Term.

NEW YORK, April, 1894.

Maximilian Toch, individually and as administrator, etc., vs Henry M. Toch and another, executors, etc.

LAWRENCE, J.

Moses Toch died on the 27th of July, 1884, leaving a last will and testament, which was duly admitted to probate on the 19th of August, 1884, in and by which he appointed his brother, Bernard Toch, as his sole executor, and letters testamentary, on the latter day, were duly issued to Bernard as such executor. After making a provision for his wife, in lieu of dower, and for the support of his children, consisting of a trust fund of \$25,000, upon the cessation of the trust he bequeathed the said sum absolutely to his brother, Bernard Toch. The said will contains the following provision: "I give, devise and bequeath to each of my children who shall attain the age of twenty-four years the sum of one thousand dollars absolutely and forever, and I direct my executor to pay the said sum to each child on its twenty-fourth birthday. In case any child should die before attaining the age of twenty-four years, no benefit to my other children or to my wife is to accrue therefrom, but the money bequeathed to such child shall follow the residue of my estate and be inherited by my brother, Bernard Toch." He then devises and bequeaths all the rest, residue and remainder of his property to his brother, Bernard Toch, absolutely and forever.

Bernard Toch died on the 14th of April, 1886, leaving a last will and testament, which was duly probated May 21, 1886, and letters testamentary thereon were duly issued to Henry M. and Jacob B.

Toch, on that day as executors. Bernard Toch never filed any inventory or account as executor under the will of Moses Toch.

On or about the 8th of October 1886, the plaintiff was, by the Surrogate of the County of New York, duly appointed the administrator, with the will annexed, of the estate of Moses Toch, deceased, and since then has acted and is still acting as such administrator. The defendants, Henry M. Toch and Jacob B. Toch, have not filed any inventory of the estate of Bernard Toch, deceased, nor have they made any account of their acts as such executors. The other defendants in this action are the children of Moses Toch and Bernard Toch, and parties with whom said children have intermarried. Bernard Toch died without having paid the legacies to the children of Moses Toch, mentioned in the latter's will. In his will, Bernard directed his executors to take out of and from his estate "a sum of money which will be sufficient to pay and satisfy all unpaid legacies which my respective brothers Leopold and Moses Toch did, in and by their respective last wills and testaments, bequeath and leave to their respective children, to be paid to such children as each of them attain the age of twenty-four years, and to pay and deliver said sum of money to the person or persons who may hereafter be duly appointed as administrators, with the wills of said Leopold and Moses Toch annexed, in such sums or portions thereof as may be necessary for the purpose of carrying out the said wills and testaments of Leopold and Moses Toch, respectively."

No question arises in this case under the will of Leopold Toch.

After making certain specific and general bequests, the will of Bernard provides as follows: "All the rest, residue and remainder of my estate, both real and personal, which I have not heretofore specifically given, bequeathed and devised, it being my intention not to die intestate, either real or personal, subject to the execution of the next following clause, I direct be divided into two portions or shares, and I hereby devise and

bequeath one equal portion thereof to my children living at the time of my death, share and share alike in absolute ownership, and the other portion to the children of my brother Moses Toch living at the time of my death, share and share alike, in absolute ownership" (see clause 9 of the will.)

By the 10th clause it is provided: "I hereby empower and authorize my executor and executors hereinbefore named, or such of them as may duly qualify as such, in his or their discretion, and at such time as they or he deem best, to sell any or all of my real estate, except the premises known as numbers 293 and 295 East Tenth street, in the City of New York, and mentioned in the 8th clause of this my last will and testament, at public or private sale, or on such terms as he or they may, in his or their discretion, deem best and proper, and to execute good and valid deeds thereof, for the proper conveying and assuring the title thereof, and *for the purpose of carrying out any and all of the provisions and directions contained in this my last will and testament*, and also for the purpose of paying off and discharging the principal sum which may at the time of my death or thereafter become due on any mortgage on any real estate of which I may die seized, and substituting a new mortgage in its place."

By the 11th clause of Bernard's will it is provided as follows: "I hereby empower and authorize my executor or executors hereinbefore named, or such of them as may duly qualify as such, to mortgage all or any part of the real estate of which I may die seized, except the premises numbered 293 and 295 East Tenth street, in the City of New York, and *apply the proceeds thereof towards the carrying out of any of the provisions contained in this my last will and testament*, or the paying off or discharge of the principal sum due on any mortgage on any of said real estate as aforesaid, and if upon so applying the said proceeds to either of said purposes, *there be any surplus*, I direct the same, that is said surplus, shall form

and be considered a portion of my residuary estate, and be divided as is directed by the 9th clause of this my last will and testament."

From these provisions I think it very clear that it was the intent of the testator to declare that the legacies to the children of Moses Toch, directed to be paid, should be a charge upon his real estate. Whether such legacies are so payable is always a question of intention, and, even if there be no express direction that legacies shall be a charge upon the real estate if the intention of the testator so to do can be fairly gathered from the provisions of the will and extraneous circumstances a Court of equity will so decree (*Hoyt vs Hoyt*, 85 N. Y., 142; *Scott v. Stebbins*, 91 N. Y., 605; *Tracy v. Tracy*, 15 Barb., 503; *McCorn v. McCorn*, 100 N. Y., 511).

It will be noticed in this case that the power of sale which is given to the executors is confined to them for the purpose of *carrying out any or all of the provisions and directions contained in the will*. This, in my opinion, clearly evinces an intention on the part of the testator that a resort should be had to a sale of the real estate, in order that the legacies in question might be paid, and, if such was the intention of the testator, inasmuch as by the 4th clause of Bernard's will the legacies are directed to be paid to the person or persons who may hereafter be duly appointed as administrators with the wills of Leopold and Moses Toch annexed, the plaintiff as administrator of Moses is entitled to maintain this action. I am, however, of the opinion that, as respects the \$14,000 of personalty, consisting as the evidence shows, of Moses' undivided one-half interest in the business carried on by him and Bernard, valued at \$9,000, and the amount of the policy of insurance collected by Bernard, amounting to \$5,000, the plaintiff is not entitled to the relief which he seeks in this action. There is nothing in the case to show that the sum of \$25,000 referred to in Moses Toch's will, has not been invested, as in said will directed, and as to that Bernard Toch upon the cessation of the trust was to become

the absolute owner. He is also made the absolute residuary legatee under Moses Toch's will.

There is nothing to show that there are other debts than the legacies which, as we have seen, are chargeable upon the land. If there are such other debts, it seems to me that in respect thereto, the plaintiff is a general creditor of the estate of Bernard Toch, and that this action should have been brought under the provisions of the Code of Procedure, contained in sections 1837 to 1860, and in section 2749 to section 2801.

The motion to dismiss the complaint which was reserved upon the trial will therefore be denied, and a judgment in favor of the plaintiff decreeing that the legacies given to Moses' children are an equitable lien and chargeable upon the real estate, and that the land should be sold for the payment of said legacies and interest will therefore be entered.

Findings to be settled on two days' notice.—*N. Y. Law Journal*.

COULDN'T GET A CLEAN BIBLE.

Each Talesman in the Meyer Case Kisses a Different Page—No New Juryman.

The early talesmen, says the *N. Y. World*, in the fourth panel of jurors for the Meyer poisoning trial before Recorder Smyth yesterday objected to the covers of the Bible on which they had to make oath prior to being examined as to their qualifications. About five hundred talesmen, from whom only ten men had been chosen to serve, had already kissed the book. It was a well worn court Bible, and the binding was frayed and the covers were smooth and greasy.

Recorder Smyth sent to the other court-rooms and to the District-Attorney's office for a new Bible, but it could not be had. Then he ordered that the pages of the Bible be opened in a new place to receive the kisses of each talesman. Yesterday's kissing began at Leviticus. Clerk Penny swore the jurors through this, the third book of the Pentateuch, thence through Numbers and Deuteronomy, and then through Joshua, Judges, Ruth, I. Samuel, and well into II. Samuel. Not a single

addition was made, however, to the fatal ten men, who have been sighing and weeping in the jury box these past few days.

Recorder Smyth, exasperated at Lawyer Brooke's peremptory challenge of a man named Cash, stood up in his place and declared the latter to be a good and eligible juror.

The Recorder ordered another panel of 150 men for to-day, Second Samuel will be finished early this forenoon, and it is quite possible that Revelations may be reached before the Meyer jury is complete.

David Dudley Field's Will.

The will of David Dudley Field was filed in the Surrogate's office for probate yesterday, by Justice Stephen J. Field, of the United States Supreme Court. The will was made on May 22, 1890, and there are two codicils, one dated November 22, 1891, and the other dated November 3, 1892. The first bequest made is that of \$5,000 to the town of Stockbridge, Mass., the income to be used to keep in order the graveyard where he says so many of his ancestors are buried. He gives \$5,000 to Haddam, Conn., his native town, to keep in order the Field Parks. "I make no other gifts to charity," the will says, "because I have during my life given so much in that way that my fortune has become only what seems to me sufficient for the support of my daughter and her children in the manner to which they have been accustomed." Each of the grandchildren, Dudley F. Musgrave, Arthur David Musgrave and Herbert Musgrave, gets \$10,000. These children are the sons of Lady Jeannie Lucinda Musgrave, the testator's only daughter, who was married to Sir Anthony Musgrave, now deceased, and formerly the Governor of Queensland, Australia. The children are not to acquire these legacies until they reach twenty-one years of age. Eden Hill Park, with its buildings, furniture and appurtenances, is left to the daughter also. To his daughter-in-law, Laura B. Field, wife of his son Dudley, the house at 83 Irving place is left, besides other property in this city. Jennie Lucinda Musgrave, Cyrus W. Field, Stephen J. Field and Henry M. Field are made executors to the will, the testator expressing the wish that the last two named will examine his books, papers and diaries, and collect such of his writings as they see fit and have them published. The second codicil appoints Robert M. Galloway trustee, in place of Cyrus W. Field, after the latter's death.

-N. Y. Law Journal.

Sixth Judicial Circuit.

JUDGES.

Hon. C. S. Bentley, Bryan, O.
Hon. G. R. Haynes, Toledo, O.
Hon. C. H. Scribner, Toledo, O.

JUDGMENT AFFIRMED.

Lake Shore & Michigan Southern Ry. Co. vs Charles Raitz

Opinion SCRIBNER, J.

On the second of April 1890, Raitz was an employee of the railway company and his duty was to clean the ash pan of locomotives when they had come in from a run on the road. On that day he went under an engine standing over the ash pit, for that purpose. The hostler on the engine at Raitz's request let steam into the cylinders and caused the engine to move about two feet backward so as to get it in the proper place to clean the ash out, and then closed the throttle, applied the steam brakes and stopped the engine, and then let off the brakes and set the lever on the center, the cylinder cocks being open. Raitz then put his hand out from under the engine and just back of the wheel of the forward trucks in order to get the hose lying there to wet the ashes down, when the engine started and the truck wheel ran over his left hand and cut it off. He claims that the valves of the engine were leaky and that in consequence of that the engine suddenly moved as aforesaid. Proof was given tending to show that this movement of the engine occurred five or six minutes after the steam had been shut off and the brakes released and that it would not have occurred unless the valves were defective. His evidence also tended to show that about four years before, in 1886, at Elyria, the same engine had "run away" while the engineer and fireman were away from

it for a few minutes, and smashed its pilot, and that it had been taken to the shop for repairs, and that again in 1888, about two years before the accident to Raitz, the engine had been sent to the repair shop on account of its leaky throttle valve and repaired. It was claimed by the Company that the engine was in perfect order and condition when Raitz was hurt, but that he put his hand out for the hose immediately after the brakes were let off and that the unexpanded steam in the pipes moved the engine a few feet, and that such a movement is usual, and does not indicate any defect in the engine or the valves of the engine. The jury rendered a verdict in favor of Raitz, and the Court of Common Pleas, having refused a new trial, rendered a judgment upon the verdict and this judgment is now affirmed by the Circuit Court in a majority opinion.

The coincidence is noted that this accident occurred in the early morning of the very day that the law of 1890 was passed, providing in substance, that where an injury occurs to an employee of a railroad company by reason of defective machinery, the company shall be presumed to have had notice of the defect and to have been negligent.

DUTY OF RAILROAD CO.

Assigning Competent Men—Not Necessary to see that they Do Their Duty.

717—The Pennsylvania Company vs Charles Fox—Fox was in the employ of the Penn Company at its yards in Toledo as a "car recorder," his duty being to take the number of freight cars coming into the yard. On the — day of — a freight train came into said yard and Fox placed himself in the center of a track parallel and next to the track on which

said freight train was coming, in order to note the numbers of the freight-cars as they passed him. Adjoining the track upon which Fox stood was an open space where he could have safely stood to take the numbers of the cars. As he placed himself on the track he looked up that track to two switches substantially in line with each other, the further one being about 125 feet from him. As he glanced to the switches he saw some empty passenger cars, and perhaps a box car, being pushed by a switch engine toward him on the track at about the place of the further switch, but as he thought he saw the cars were starting from the track upon a side track at the further switch, and were not coming further toward him, he turned his back towards those empty cars and addressed himself to noting in his book said freight car numbers, and in a few minutes thereafter he was struck and injured by said empty cars, which had not, as he supposed they had, gone in on the sidetrack but continued to advance towards him till they struck him. In this petition against the company Fox charged that the company was negligent in the person of the yardmaster, in not performing the duty and following a long observed custom known to Fox and upon which he relied, of having on the front of cars moving about the yard as these empty passenger cars were, a brakeman to stop them and warn persons to get out of the way. Though no brakeman was on the front of the cars on this occasion the evidence showed that the yardmaster had assigned a sufficient number of competent men to move and switch the empty cars, and did not know that they were not doing their duty. The company denied that it or the yardmaster was negligent and charged that Fox himself was guilty of negligence in standing where

he did or not keeping constant watch for his safety. On the first trial of the case a verdict and judgment were rendered for Fox which the circuit, by a majority opinion, affirmed. These judgments were afterwards reversed by the supreme court on the ground that the court of common pleas refused to charge the jury as requested in the 8th request of the Penn Co. This request is, in substance, as follows: That if the yardmaster assigned a sufficient number of competent men to do said switching he was not bound to go with them to see that they did their duty, and was not negligent in omitting to do so. The supreme court having reversed the judgment, with the full record before it, settles the law of the case that the yardmaster is not negligent if he assigns a sufficient number of competent men to do the work though he does not go with them to see that they perform their duties. The evidence not showing that the yardmaster knew that these men would not do, or were not doing their duty, the necessary implications from the decision of the supreme court in the case reverses the judgment of the court of common pleas and sets aside the verdict and remands the case to the court of common pleas.

UNWARRANTED BY EVIDENCE.

752—The C H V & T Ry Co. vs John Burns.

The plaintiff below recovered a judgment against the plaintiff in error for damages from being run over by an engine of the said Railway Co. in the yards used by that company and the Pennsylvania Co. in Toledo, November 10th 1891, and while Burns was a day laborer for the Pennsylvania Co., cleaning dirt from a wagon-crossing over its tracks near its freight depot.

The evidence showed, without contra-

diction, that his said work was upon tracks in almost constant use for the passage of engines and cars, to his knowledge, and that he did not look up after he started to work for the purpose of seeing whether any engine or cars were coming, but relied wholly in being warned in time by the bell of any engine which might approach, though nothing obstructed his view of the tracks for over 300 feet; that an engine, whose bell was ringing approached him while the engineer was looking at the bridge to see if any train or engine was coming, and not seeing Burns, ran over his arm, and injured it so as to require amputation a short distance below the shoulder. It was shown that the engine was backing at the time and that its tender concealed the track from the engineer for from 50 to 75 feet, and it did not appear from the evidence, how far the engine was from Burns when he stepped between the particular tracks whereon the engine came; the negligence charged in the petition was that the engine was moving without giving any warning by bell or otherwise, and that the engineer was not on his engine, having left it in charge of an incompetent fireman. The proof that the bell was ringing was overwhelming and no proof whatever tended to show that the engine was not being run by the engineer himself.

Held by the Circuit court:

That the verdict was unwarranted by the evidence.

Judgment reversed.

Knowledge by Company.

709—The Toledo Cou. St. Ry Co. vs Rudolph Yunker—In this case Yunker sues the railroad company for alleged negligence in furnishing and using an unsafe hame strap which was used on the harness of the horse he was driving. The horse suddenly reared and plunged, the hame strap broke and Yunker, who had hold of the lines, was suddenly and with force thrown or drawn over the dash board of the car and severely injured.

Held that the jury were warranted in finding that the hame strap furnished and

used by the company was of poor quality and insufficient for the service and the breaking of the one in use upon the horse Yunker was driving was the cause of the accident; that the company had knowledge of said defects through the foreman of the car barn, who, under the evidence, might properly be held to be the representative of the company in that behalf, also from statements made to the manager; that the doctrine of non-liability for acts of co-servant does not therefore apply to defeat the action; that the plaintiff was without negligence and might properly recover. Judgment affirmed.

ACTIONABLE NEGLIGENCE.

711—The Findlay Brewing Co. vs De. los W. Bellman—In this case Bellman sued the brewing company for costs and expenses in care of and attention to his infant son who, as he alleges, received injuries through the negligence of the brewing company.

The alleged negligence consisted in the brewing company placing in the street and at the side of the brewery building, a tank 16 feet in length, 3 feet 10 inches high and some 4 feet wide, into which it was accustomed to convey by a spout the hot "mash" from its brewing tubs, from whence it was taken when cool by a party to whom the company had sold the same, who, in turn, sold and delivered the same to his customers.

Plaintiff's son, 6 years of age, went with a boy 10 years of age, who went to receive "mash." The "mash" not being cool when they arrived, the boys got upon the edge of the box to see the "mash" run into the box. While sitting there by some means unexplained, the boy slipped into the hot "mash," and the plaintiff's son was badly scalded. There was no covering to the box, nor was any one appointed to watch or care for it. The lad was then 6 years of age, and was absent from home without knowledge of his parents and without any apparent negligence on their part. Verdict and judgment was for plaintiff, Bellman.

The plaintiff in error contented in argument that there was no actionable neg-

ligence on its part and no cause of action shown against it. Held under authority of Harriman's case, 45 St. and like cases, that the brewery company was properly held liable.

Judgment of Common Pleas affirmed.

CONTRIBUTORY NEGLIGENCE.

SATURDAY, April 7, 1894.

748—The L. S. & M. S. Ry Co. vs Ann Eagan, admr of Daniel H. Eagan, deceased.

Opinion by BENTLEY, J.

The plaintiff below recovered a judgment against the plaintiff in error, here, for \$500 for causing the death of said Daniel H. Eagan, by negligence, on the 4th day of May, 1890. The accident occurred in the company's yards at Air Line Junction where said Eagan was employed as a switch-tender, his left leg between the ankle and knee being run over by an engine and crushed; he died from the shock. The petition charges that he caught his foot in an unblocked switch or frog, and that an engine negligently moving without ringing of its bell or giving any signal ran against and over him.

Two former trials had resulted in a disagreement of the jury.

The evidence showed that his foot was uninjured but that his leg above the ankle was so completely crushed that it must have been actually run over by the engine wheel. The only evidence tending to show that his foot was caught was that it was caught between the south rail of the west bound main track and the extreme end of the movable switch rail south of said main track rail, which space, the uncontradicted evidence showed, could not be blocked. The character of the injury showed that it could not have been received from that cause and the manifest weight of the evidence showed that the injury occurred where there were no switches or frogs, at a point where the decedent had no duties to perform, and by his thoughtlessly stepping one foot between the tracks, immediately in front of a moving engine whose bell was then ringing.

Judgment reversed.

PETITION INSUFFICIENT.

Allegation of Youth, Inexperience and Injury Without Plaintiff's Fault Not Equivalent to Allegation of Want of Knowledge or Incapacity of Plaintiff.

732—The Consolidated Street Railway Co. vs Chas. Maier.

Chas. Maier, fifteen years old, was injured by having his foot run over by a street car while in the employ of the street car company, driving a horse attached to a street car over Erie street bridge in Toledo, and recovered judgment in the Court of Common Pleas against the street car company for \$—— damages for his injury, two former trials having resulted in a disagreement of the jury. The sufficiency of his petition was not tested by demurrer but on the trial it was claimed by counsel for the company that his petition was insufficient and objection was made to the reception of any evidence under it, but the objection was overruled and exception taken. At the close of the evidence the company's counsel moved to arrest all evidence from the jury and for an instruction directing a verdict for the defendant, this being refused and exceptions taken, the company offered its evidence and at the close of all the evidence, again asked for an instruction to the jury to return a verdict for the defendant and excepted to the court's refusal to give this instruction; and after a verdict had been rendered against it moved for a judgment in its favor *non obstante verdicto* and also for a new trial, as well upon the ground of insufficiency of the petition as for the alleged insufficiency of the evidence to show the company's liability, and took exceptions to the over-ruling of each of those motions.

The charging part of the petition is as follows:

* * that the plaintiff is a minor 15 years of age and at the date hereinafter named was in the employ of the defendant as a common laborer, in such work as he was able to perform.

A portion of the defendant's line of railway on the 19th day of November, 1890, extended along and through Erie

street in the city of Toledo and crossed over a public bridge over the Wabash & Erie canal and Swan creek which said line of street railway was being operated by electricity and the use of electric cars.

* * * * *

Said bridge at the time was considerably elevated above the general grade of Erie street in the vicinity and made it quite hard and difficult to move said cars up said grade and across said bridge, and requiring three horses and the use of judgment and skill, on the part of those managing said horses and said cars, to get them over the bridge with safety. Said horses being so used were driven three abreast. Said Erie street bridge is located in the populous part of the city and has a great deal of public travel over the same in both directions and in addition was quite narrow, so that said three horses and two horses attached to a double wagon in moving on said bridge would nearly fill the entire width of the same.

Plaintiff at the date named was wholly without experience or knowledge either in the management of horses or of moving or handling said cars.

On the afternoon of the 18th day of November 1890 the plaintiff by the orders and directions of the foreman of the barns, in the employ of the defendants, and whose orders in that behalf it was the duty of the plaintiff to obey, ordered and directed the plaintiff to go to said Erie street bridge in charge of one horse and assist in moving the cars over said bridge. Plaintiff went in accordance with instructions and worked there the remainder of said day and returned again on the morning of the 19th and commenced the same work. Said foreman at the barn whose duty it was to provide the plaintiff with all suitable appliances for managing said horses and doing said work, negligently and carelessly provided plaintiff with lines to drive said horse which were so short that in driving said horse when attached to a car with the other two horses he could not stand or ride upon the platform of said car and guide and manage the same, with any degree of safety to himself or said horses, and

he was in consequence of the shortness of said lines compelled to go along on the street at the side of said horses and car for the purpose of managing said horses.

On the 19th day of November while the plaintiff was so assisting in moving one of the defendant's cars over said bridge and while on said bridge and while the plaintiff was walking along on the street by the side of said horses as he was then compelled to do by the shortness of said lines, a large heavy brick wagon to which were attached two horses, met said horses and car on the bridge and thereby nearly filled up said roadway and brought the plaintiff in between said moving wagon and said car and horses. Both the horses attached to said car as well as those attached to the wagon thereupon became excited and partially unmanageable and put the plaintiff in great peril and danger from his position and without any fault of his own and without being able to prevent it, or to extricate himself therefrom he fell or was knocked down, onto the railway track on which said car was moving and the wheels of said car passed over the instep of his left foot and so mangled and crushed the same.

* * * * *

Plaintiff says that said car was a mottor car and was in the charge of a motorman so called, and a conductor, both servants of the defendants in charge of the management and control of said car.

* * * * *

Plaintiff says at the time he was sent to do said work he was not of sufficient age and experience to do the same, as the defendant well knew or by the exercise of reasonable and proper care on its part should have known.

Plaintiff says that he sustained the injuries aforesaid without any fault on his part and wholly through the negligence of the defendant in failing and omitting to furnish the plaintiff with suitable lines to do said work and in requiring the plaintiff to perform said work with the lines furnished him and through the negligence of the servants and agents of the defendant in charge and control of the bells, gong and signals on said car in

wrongfully ringing and sounding the same as they did in such a manner as to excite said horses and increase the peril in which plaintiff was placed and in the negligence of the defendant in placing plaintiff in charge of said work and imposing upon him such duties to perform without experience, without any caution or instruction as to the manner of doing the same and in ordering the plaintiff to move said car over said narrow bridge with the public travel thereon, in the manner in which he was directed to do the same.

HELD BY THE CIRCUIT COURT: That the petition does not state facts sufficient to constitute a cause of action for that it does not appear thereby that said defendant is responsible to plaintiff for the negligence of said mottor man or conductor nor that the plaintiff was required or expected to ride upon said car while driving said horses nor that said lines were too short nor otherwise defective for driving said horse while plaintiff walked upon the ground, nor that the defendant knew or was chargeable with notice or knowledge that said horses would or were likely to become excited or unmanageable on said bridge, nor that to the defendant's knowledge, the position in which the plaintiff was placed was, without some negligence or wrongful act on the part of some one, necessarily or likely to be one of danger. Nor is it alleged in said petition that said plaintiff himself did not know or was incapable of appreciating the danger, if any, to which said employment then and there exposed him, the Court being of the opinion that what is alleged in said petition regarding the youth and inexperience of the plaintiff in managing horses or cars and that said injury to him was without his fault, is not equivalent to the allegation of want of knowledge or incapacity in the plaintiff which is requisite in such cases. 46 Q. S. 283; 49 O. S. 598.

It being suggested by counsel for Maier that as it would be necessary for him to amend his petition and that the Court of Common Pleas, upon the case being remanded, might impose such terms and conditions for such amendment as he

would deem onerous, he asked that the Circuit Court might itself enter as a part of its order, a direction to the Court of Common Pleas to allow such amendment, but the Circuit Court is of the opinion that it has no power to make such order but that the Court of Common Pleas will act in the matter equitably in view of the circumstances including its own orders in the premises.

Judgment reversed for insufficiency of said petition and cause remanded to the Court of Common Pleas for further proceedings according to law.

JUDGMENT REVERSED.

Verdict Contrary to Law and not Sustained by Sufficient Evidence.

750—The Lake Shore and Michigan Southern Railway Company, Plaintiff in Error against Edward L. Lamphere, Defendant in Error.

Lucas Co., April 21, 1894.

HAYNES, J.

In this case a petition is filed for the purpose of reversing the judgment of the court of common pleas in a case wherein Edward L. Lamphere was plaintiff and the Lake Shore & Michigan Southern Railway Company was defendant.

The amended petition complains of the Railway Company for injuries received by the plaintiff, Lamphere, who was employed as a yard brakeman in the yards of the company in East Toledo; that some time in the night he undertook to make a coupling between two cars, one of which was a car that had what is called an Eames draw-bar or coupler upon it—like the one lying here before us—and the other car had a skeleton coupler, as it is called, one being about three inches higher than the other, projecting from the cars so that when the cars approached each other it became necessary to raise the link some two or three inches in order to have it enter into the car towards which it was approaching—the stationary car—and make the necessary coupling. These cars, it appears, had come from the west some time prior to the day of the accident—just when, it does not appear from the evidence—and were in the yard

and gathered together at this time for the purpose of making up a train to go East.

The petition in setting out the character of the cars, and the fact that one of the cars was higher than the other, proceeds to state that "for the purpose of making the coupling plaintiff took hold of the link in the draw-bar on the advancing car (that is the Eames car) and attempted to raise the same to make the coupling aforesaid; that said link was held very firmly in its place by an extra large pin, so that it could not be moved and in attempting to move the same into position to make the coupling plaintiff's hand slipped and the right arm was caught between the buffers or dead-woods of the two cars—both of said cars being supplied with double buffers or dead-woods—and was severely injured;" in this, that his right arm was jammed and smashed so that it became necessary to amputate the same just below the elbow." Further on he says that "the injury so sustained by him was without any fault or negligence on his part, but through the fault and negligence of the said defendant in not properly inspecting the said cars; in not furnishing proper coupling-pins for use in such wide draw-bars; in allowing the said centre pin to be so firmly driven into and through the said link and in receiving the said Merchants Despatch Transportation Company car with the link so firmly held in the draw-bar." These are really the two grounds upon which he proceeds to bring the action.

The testimony of the plaintiff is, that about half past twelve, I think it was, on a certain night of January, 1892, he was at work with the engine and was assigned the duty of coupling cars and that this Merchants Despatch car, with the Eames draw-bar upon it was hitched onto a train of some eight or ten cars, with a yard locomotive attached to it and they backed down onto a certain track called No 9., towards the other car having the skeleton draw-bar in it; that he had approached near the cars as the cars approached each other and when the cars were within about five or six feet of each other he drew still nearer and perceived the manner in which

the coupling pin was lying and that he then went in and attempted to make the coupling. He says he didn't use a stick because it would be of no avail, one link being higher than the other, that the link would not balance, but would slide back into the draw-bar if he attempted to use a stick; so he took hold with his hand and pushed it up and at the same moment his arm slipped and was thrown up and it became very severely injured, and was amputated, perhaps within the next 24 hours. He says further, that not feeling the blow at the first moment or the pain, he turned and looked at the coupling and held his right towards it and he saw then that the Eames draw-bar which had the large link in it had the link thrown back and that there was a smaller link in it and that that was held by a pin which went through it and was not an ordinary pin used by the Lake Shore Company upon their cars, but was a bolt such as was frequently used for the purpose of fastening the car itself upon the truck, and that the link was projecting some and that it was fast; that the large bolt held it, the bolt filling the space in the link very full so that it couldn't be moved, and that the reason he received the injury was, that, instead of the bolt moving as he had anticipated, it was firm and in pushing it his arm slipped. He was then taken away by the same locomotive that was pulling the train and was taken by the employees across the river and to the hospital.

The conductor of the train, as soon as he saw the man started upon the locomotive, went to the cars where the injury occurred and made, as he says, a thorough examination of the cars. He says he found the coupling of the draw-bar of the Eames car to be an ordinary link and with an ordinary Lake Shore bolt through it, put in from the under side and passed up through, as was the custom when they used those bolts; that he handled the link, and that it moved very easily in the coupling; that he threw it back and forth and that there was no trouble with it. An inspector and another man named Miller, the yard master, in about an hour, went

there. The yard master was occupied in sending off the plaintiff below, and when he got through with that he went and got the inspector and the two went up to the cars, which the evidence shows remained substantially as they were, and they made an inspection of the cars and they found that the bolt was loose; that the link was loose; that the bolt passed through it; that it was an ordinary link for the Lake Shore cars and that the bolt was an ordinary Lake Shore bolt.

In giving his testimony under this head, of the inspection of the car, the inspector testified that the cars were all inspected as they came into the yard, and, while he couldn't tell the exact moment that this car came in, he said that it had been inspected. Upon cross examination that matter was gone into thoroughly and it was shown very clearly that the car itself had been inspected by the regular inspector of the Lake Shore Company when it was received into the yards of the company and before it was attempted to be put into this train.

Now, on those two points we are called upon to pass. This injury occurred prior to the passage of the act of 1890, I think it is, so that the cause of action arose under the law as it stood when the decision in 42 Ohio State was in full force, and it being shown beyond contradiction that the car was inspected when it came into the yard, if the contention of the plaintiff be true that the bolt which was used was a bolt such as was used for the fastening of the car upon the truck, that was too large for the link, and if the link was bound by the bolt in the manner in which he has stated and if it had come into the yard and was received and used by the Lake Shore Company in that condition, then the negligence, if there was any negligence, was the negligence of the inspector in receiving the car; and, under the decision 42 Ohio State, that would be the negligence of a co-employee for which the company would not be liable; so, upon that ground, as a matter of law the plaintiff was not entitled to maintain his action.

Furthermore, if the testimony be received and weighed, we think that the

weight of the testimony of three witnesses clearly establishes the fact that he is mistaken when he says that the link was bound at that time or that the bolt used was larger than the ordinary coupling pin of a Lake Shore car.

The judgment of the Common Pleas will be reversed, and the judgment set aside, for the reason that the verdict is contrary to law and not sustained by sufficient evidence, and the case will be remanded for a new trial.

Corner Lot Assessments.

716—James Rooney vs City of Toledo—Rooney brought suit to enjoin the collection of an assessment made by the city of Toledo upon a lot at the corner of Missouri street and Collingwood avenue. The lot had a frontage of 9 feet on Missouri street extending back abutting Collingwood avenue about 135 feet. There was a house built in part upon this lot and extending over upon the adjoining lot. The assessment was for the improvement of Collingwood avenue and was assessed by the foot front of said lot in length abutting upon Collingwood avenue. The plaintiff claimed that under the decision of the Supreme court, in the case of Haviland vs the city of Columbus, decided last winter, that the lot could be assessed for only the extent of its frontage on Missouri street, to-wit: 9 feet, and that the balance of the assessment was illegal. City denied plaintiff's conclusion and set up that, he having full knowledge of the making of the improvement, and that it would be of benefit to the property, and of the making of the assessment, he was now estopped from alleging the illegality of said assessment. The court held that under the Haviland case, plaintiff's lot could not lawfully have been assessed upon a frontage of more than 9 feet, being the foot frontage in width of the lot upon Missouri street. Also held upon the authority of Alger vs the city of Columbus decided by the Supreme Court, and reported in the 44th Ohio State, that the plaintiff was not estopped from contesting the legality of the assessment. The city was enjoined from collecting more than the assessment properly made upon 9 feet, being the foot front in width of the lot upon Missouri street.

Supreme Court.

SUPREME COURT PROCEEDINGS.

Causes up to and including No. 2849, on the General Docket, are called and submitted. The next call will be to and including No. 2960.

TUESDAY, April 24, 1894.

General Docket.

2655. Reed V. Boice vs Wm. R. Hodge et al. Error to the Circuit Court of Lucas county.

BRADBURY, J.

A holder of stock in an Ohio corporation, who transfers his stock after a corporate debt has been created, is not relieved from his statutory liability for such debt, by an agreement for an extension of the time for its payment; although such agreement be made by the corporation and creditor after such transfer, and without the knowledge or consent of the transferrer.

Judgment affirmed.

2646. James M. Kerr et al vs Charles E. Lydecker, Adm'r. Error to the Circuit Court of Galia County.

BURKET, J.

A mortgage is a speciality, and an action for its foreclosure and sale of the premises, comes within the provisions of section 4980, Revised Statutes, and the period of limitation is fifteen years, unless extended by virtue of section 4992 Revised Statutes.

Judgment reversed.

Nos. 3738 and 3749. Aaron McNeill, assignee vs John Hagerty, Auditor of Hamilton county; Herman P. Goebel, trustee vs Leo. Schott, treasurer of Hamilton county. Error to the Circuit Court of Hamilton county.

SPEAR, J.

Personal property, whether in the form of moneys, bills receivable, bonds, certificates of stock, or otherwise, held by an assignee of an insolvent debtor whose estate is being settled in the probate court, is not subject to taxation, and it is not the duty of such assignee to make return of the assets of

such estate to the county auditor for taxation.

Judgments of the Circuit Court reversed, and those of the Common Pleas affirmed.

No. 2649. Trustees of Jackson Tp. vs Henry Thoman et al. Error to the Circuit Court of Crawford county.

MINSHALL, J.

1. It is a general principle in the law of recovery that a parties' possession of a thing cannot be disturbed by one who cannot show a better right to it. Therefore, irrespective of his own title, a party to a suit has the right to object to an order requiring him to pay money in his possession, or that of his agent, to one who shows no better title to it.

2. A suit cannot be maintained by one taxpayer on behalf of himself and others to recover back taxes, alleged to have been illegally assessed, on the ground that the taxes were involuntarily paid by each. In such case each must bring the action on his own behalf.

3. A tax-payer commenced a suit on behalf of himself and other tax-payers against the county treasurer to restrain the collection of a tax alleged to have been illegally levied, and obtained a temporary order restraining the collection of the tax until the final hearing on the merits. Subsequently he filed a supplemental petition, alleging that since the commencement of the suit—the injunction being in full force and unmodified—all had been involuntarily compelled to pay the tax by the refusal of the treasurer to receive the taxes due from them, though tendered, unless they paid the taxes that had been enjoined, and threatened to return their lands as delinquent and cause them to be sold, unless they did so; Held, that a payment made under such circumstances is not an involuntary one, and a recovery back cannot be had.

4. When the lands of a person have been sold at delinquent tax sale, he must, in the first instance, apply to the auditor of the county for their redemption, under the provisions of the statute in such

case made and provided, Section 2889, *et seq.*

Judgment reversed, and judgment for the defendants below dismissing the action of the plaintiff.

2351. The Springfield Fire and Marine Insurance Co. vs Julia M. Hull. Error to the Circuit Court of Mahoning co.

WILLIAMS, J.

1. A contract, the consideration of which, in whole, or in part, is the suppression of a criminal prosecution, is without any legal efficacy, either as a cause of action, or a defense to an action not founded on, or arising out of, the agreement.

2. The rule that a party who would rescind a contract must restore what he has received under it, does not apply to contracts founded on an illegal consideration, and void for that reason.

3. In certain cases where applicable, the rule is satisfied if the judgment sought will substantially restore the party to the situation he was in when the agreement was made; as, when money paid by him is less than he justly owed the other party, and the same is credited, and the action brought for the balance.

4. Where a person is induced by threats of a groundless prosecution to accept a less sum than is justly owing to him on a policy of fire insurance, in satisfaction of his claim, and to surrender the same, he may maintain action on the policy for the balance due, without returning or tendering back the money so received.

Judgment affirmed.

2635. Alexander M. Byers vs Samuel Schlupé et al. Error to the Circuit Court of Marion County.

DICIMAN, C. J.

1. In a civil action for the recovery of money, the plaintiff may, on the ground that the defendant is a non-resident of this state, have an attachment against the property of a defendant partnership of which all the members reside outside this state, which was formed for the purpose of carrying on business in this state,

and which has a usual place of doing business in this state.

2- In an attachment against the property of such a non-resident partnership, it may be sued by its company name, and service may be had by leaving a copy of the summons, with the indorsements thereon, at its usual place of doing business in this state.

Judgment reversed.

3926. John Sandrock v Columbus et al.

For the purpose of determining the frontage of a lot with a view to its assessment, reference must be had to its situation at the time the improvement is made, and not to changes subsequently made.

Error to the Circuit Court of Franklin County.

BY THE COURT.

This case was in this court a short while since, and was then disposed of in connection with the case of *Haviland v Columbus*, 50 Ohio St. 471. Having been remanded to the circuit court for further proceedings, it appears from the record since made, that an answer was filed in which it is admitted that an assessment has been made on the property of the plaintiff to meet the bonds issued in payment of the cost of the improvement; the action having been brought to enjoin this assessment on the ground that the act under which it was made is invalid, and that the assessment exceeds any and all benefits to the property and is in excess of its actual value and its value is assessed for taxation. The answer then states that the assessment was made by the front foot, and upon the property of the plaintiff for the number of its front feet upon the improvement. The case was heard and submitted to the court upon the pleadings and an agreed statement of the facts, which by a bill of exceptions is made a part of the record. The court on consideration dismissed the petition. Whereupon the plaintiff again brought the case into this court, claiming that the judgment upon the agreed statement of facts, is erroneous and should be reversed.

From the statement it appears that it was agreed:

"1. That said plaintiff's lot at the date of said improvement was vacant, and when platted had 37½ feet on Mound street, 37½ feet on the alley in the rear, and 150 feet on Champion avenue.

"2. That after the making of said improvement, the plaintiff erected two houses on the rear end of said lot next to the alley, one occupying 35 25 feet and the other 33.25 feet, and each fronting on Champion avenue, leaving 80.50 feet on the said lot on Champion avenue vacant.

"It is also agreed that if said plaintiff were called, he would testify that he does not intend to set upon said lot any more buildings facing Champion avenue." The assessment on the lot is for its entire length on Champion avenue, 150 feet, at the rate of \$4.2762 per foot. This is erroneous. The assessment should be made with reference to the front of the property at the time the improvement was made, and not with reference to any subsequent changes. The agreed statement, taken in connection with a plat made part of the bill of exceptions, shows that, at the time the improvement was made, the lot lay lengthwise on Champion avenue, and fronted 37½ feet on Mound street. So that, under the construction given the statute regulating assessment by the front foot, in *Haviland's* case, it should, for the purpose of an assessments on Champion avenue, have been deemed as turned, so as to front as many feet on the improvement, as it in fact fronts on Mound street, and no more.

The judgment of the circuit court must therefore be reversed, and the assessment made on the lot of the plaintiff set aside, and an assessment made for the number of 37½ feet, at the rate fixed by the ordinance, \$4.2762 per foot.

Judgment accordingly.

2794. James Caldwell vs The P. C. & T. R. R. Co., et al. Error to the Circuit Court of Mahoning county. Judgment affirmed. MINSHALL, J., dissents.

3731. The Wheeling Railway Co. vs Maggie Lewia. Error to the Circuit

Court of Belmont County. Jdgt affirmed.
Motion Docket.

2153. James T. Black, Trustee, etc. v Daniel Boyd. Motion by defendant to dismiss cause No. 3653, on the General Docket. Motion overruled.

2154. Edward Clark et al, v Thomas M. Hussey. Motion by plaintiffs for stay of execution in cause No. 3954, on the General Docket. Motion allowed. The plaintiffs in error to give bond in the sum of \$500, to the approval of the clerk of the circuit court.

2155. Henry Reed v The State of Ohio Motion by plaintiff for leave to file a petition in error to the Circuit Court of Licking County. Motion overruled.

2156. Alfred Villars et al, vs Arthur McCray. Motion by plaintiffs to extend time for filing printed record in cause No. 3927, on the General Docket. Motion allowed, time extended 60 days from April 19, 1894.

SUPREME COURT NEWS.

Columbus, O., April 30th.—The following cases were filed in the Supreme Court last week:

3998—The City of Cincinnati and City Auditor vs Daniel Bartley et al., error to the Circuit Court of Hamilton County. Theodore Horstman attorney for plaintiff and Miller & Renner for defendants, all of Cincinnati.

3999—Daniel Bartley et al, vs City of Cincinnati and City Auditor, error to the Circuit Court of Hamilton County. Same attorneys.

4000—Philip Shearer, Adm'r, &c. vs Harriet F. Slocum, error to the Circuit Court of Ashland County. Campbell & Semple for plaintiff and Winbigler & Mykrantz for defendant; Ashland.

4001—Edward Evans, admr, vs John J. Jones et al, error to the Circuit Court of Van Wert County. Nash & Lentz for plaintiff, Columbus. Glenn & Wolcott for defendant, Van Wert.

4002—A. F. Ingersoll, adm'r, &c., vs Richard Smith Jr., Executor, &c. Error to the Circuit Court of Cuyahoga County. Burke & Ingersoll, for plaintiff, Cleveland. Estep, Dickey, Carr & Goff; Wilcox & Collister and Hoyt, Dustin & Kelley, for defendant, Cleveland.

4003.—Edward H. Jones vs State of Ohio. Motion for leave to file petition in error to the Circuit Court of Brown county. J. H. Cabell, Cincinnati, W. W. Dennison, Batavia and W. W. Young, Georgetown, for plaintiff. O. P. Griffith and Attorney General for defendant.

4004.—Hiram B. Swartz vs Board of Commissioners. Error to the Circuit Court of Wayne county. John McSweeney, Wooster, for plaintiff and A. D. Metz, Prosecuting attorney for defts.

4005.—Davis June et al vs City of Fremont. Error to the Circuit Court of Sandusky county. James R. Fowler, Fremont, and C. P. Wickham, Norwalk, for plaintiffs; Meek & Dudrow, Bartlett & Wilson, Garver and Garver and James Hunt, Fremont, for defendant.

4006—The Cincinnati, Jackson & Mackinaw Ry Co. vs Albert Rhoades. Error to the Circuit Court of Mercer county. Swayne, Swayne & Hayes, Toledo, and Marsh & Loree, Celina, for plaintiff.

4007—Martin Lindley et al vs Erastus Lindley et al. Error to the Circuit Court of Cuyahoga county. Willson & Davis, Cleveland, for plaintiffs and A. J. Marvin, Cleveland, for defendants.

4008—Oscar J. Cambell vs Thos. L. Johnson, Receiver, etc. Error to the Circuit Court of Cuyahoga county. J. E. Ingersoll, Cleveland, for plaintiff and Thos. L. Johnson, Cleveland, for plaintiff.

4009—State of Ohio vs Commissioners and Treasurer of Stark county and City of Fremont. Error to the Circuit Court of Stark county. R. W. McCaughey and A. A. Thayer, Canton, for plaintiff, and Peter J. Collins and Chas. C. Bow, Canton, for defendants.

410—R. G. Warner vs Wm. L. Gares; error to the Circuit court of Franklin county; J. V. Lee for plaintiff and M. B. Earnhart for defendant. All of Columbus.

4011—The Pittsburg & Wheeling Coal Co vs David Davis; error to the Circuit court of Belmont county; Joel W. Tyler and N. K. Kennon, Cleveland, for plaintiff, and Jas. C. Tallman, Bellaire, for deft.

4012—The Cleveland, Akron & Columbus Ry Co vs Chas. E. Sharp; error to the Circuit court of Knox county; Warner Harrison, Columbus, for plaintiff.

Quite an important case was argued orally before the Supreme court last Friday, being the city of Cincinnati vs R. M. Bishop et al. The Cincinnati Southern Ry Co is interested in the case. President Cleveland is also a factor in the case. The lessee of the Cincinnati Southern sued the city of Cincinnati for \$1,000,000 for failure to provide terminal facilities at Cincinnati. A clause in the contract provides for arbitration, the lessees selecting two men, the railway two and the four a fifth man. The lessees selected Grover Cleveland, who was then a private citizen with a fairly lucrative law practice in New York city, and Clarence Seward of New York. At this stage of the game the city of Cincinnati enjoined the lessees from conducting the arbitration proceedings further. The lower courts decided against the city and the case was taken to the highest tribunal. A decision is expected this week.

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SATURDAY, MAY 12, 1894.

CIRCUIT COURT DECISIONS.

Next week we begin the publication of Circuit court decisions in other counties in the circuit, beginning with Wood county. Our representative was present when opinions were delivered at Bowling Green last week, and took them in short hand, but delay in preparation and revision makes it necessary to publish them next week. We intend to publish every decision rendered in the circuit and they will, hereafter, appear regularly and promptly as they are given in each county.

UNITED STATES COURTS.

We have decided to publish not only the decisions of the United States District and Circuit Courts in Toledo, but all filings, orders, in fact all proceedings, made or had during the week. Many attorneys in different parts of the state are interested in cases pending here in the Federal Courts and for their benefit the weekly edition of our paper will indicate all that is done in the northern district.

IMPROVING IN FORM.

It is quite likely that attorneys who received the first copies of the weekly edition of our paper have felt inclined to criticize our form of reporting decisions; and we presume those in this issue are open to objection, but we are paying more attention now to established legal forms and shall aim to improve still further in this line.

JUDICIAL POSSIBILITIES.

It is confidently expected, and quietly stated, by several prominent attorneys in Toledo that Hon. C. S. Bentley, now

presiding judge of the circuit court, 6th circuit, will be a candidate for the Supreme bench this fall. Judge Bentley has not, as yet, admitted that he could be induced to accept the nomination, but he is being urged and it is altogether probable that he will be prevailed upon to do so.

There are, so far, four candidates for Judge Bentley's place on the circuit bench, Major E. B. King of Erie, J. O. Throop of Wood, S. A. Wildman of Huron and J. M. Lemmon of Sandusky. Major King, republican, is well known in Toledo and seems to be the favorite here.

MATTERS OF GENERAL INTEREST.

Among the recommendations of the Boatner committee's report on Judge Jenkins dealings with the Northern Pacific, there is one likely to attract considerable attention. It is to the effect that there shall be a carefully framed statute defining the cases in which a court of the United States may order a receivership, and that the law be made to fix the limit of time during which such receiverships shall continue and the exact powers and responsibilities of the receiver, making him an officer of the law and not a mere servant of the court.

One of New York's most talented lawyers, Joseph Hodges Choate, has been chosen president of the Constitutional Convention now in session at Albany. Men who enjoyed that honor in former conventions were, successively, John Jay, George Clinton, Aaron Burr, David D. Thompson, John Tracy and Wm. A. Wheeler.

The convention of 1867 adopted a constitution which the people refused, with the exception of one article. That article created a new system of courts. Otherwise the constitution of the state is the one adopted in 1846.

The court of Common Pleas, New York, opinion by Judge Roger A. Pryor has decided that the Ives Pool Law, of 1887, is unconstitutional, holding that a pool on a horse race is a lottery within the interdict of the constitution.

U. S. District Court.

IN ADMIRALTY.

174—Alexander St. John vs steam barge "Walter D," libel filed. \$500 claim for salvage, stipulation for costs filed. John Kelting surety.

174—Alex St John vs steam barge "Walter D;" bond filed.

175—E.E. Conrad vs barge "Brooklyn" Libel filed, labor and material. amount claimed \$307 27. F. W., Rickenbaugh, Proctor.

U. S. Circuit Court.

1218—Frederick Leavens et al vs Chas E. Bronson et al; order permitting complainants to file amended bill without costs; Parks & Parks, Cleveland

1205—Continental Trust Co et al vs T St L & K C R R Co; application of receiver for instructions in the matter of East St. Louis terminals. Brown & Geddes attys.

1218—Frederick Leavens et al vs Chas E. Bronson et al; stipulation for costs on part of complainant.

1227—The E. and D. W. Trunk Co. vs Frank J. Palica and The Common Sense Trunk Co. Proceedings to enjoin infringement of patent trunk bands and improvements and for an accounting. King & Tracy, solrs. for complts.

1227—Same vs same. Stipulation for costs. Frederick J. Eggeman, John B. Duguid, Godfrey S. Eggeman, sureties.

1205—The Continental Trust Co. vs The Tol St L & K C R R. Order extending time for S. H. Kneeland to answer to June 4-94, provided pleading shows on its face some substantial equity.

1205—Receiver S. R. Callaway's report from May 22-93 to April 30-94. Receipts \$2,545,915.08. Disbursements on account prior to May 22-93 \$488,621.97. Current accts \$2,055,713.36. Separate report for April also filed.

1139—T A A & N M Ry Co. vs The Pennsylvania Co., Peter M. Arthur et al. Petition for appeal and assignment of errors filed. G. M. Barber, F. H. Hurd, J. H. Southard, attys.

1139—Same vs Same. Stipulation as to evidence filed. A. L. Smith, J. H. Southard, attys.

1218—Frederick Leavens et al vs Chas E. Bronson et al. Amended bill of complaint. Parks & Parks, solrs.

1218—Same vs Same. Waiver of ser-

vice of subpoena and entry of appearance of W. O. Barney; Treas. of Defiance O., The Defiance Gas, Oil & Mineral Co., Rev L. Heiland, Maria L. Leonard, The Mich Mutl Life Ins Co., Ida E. Stay, Lawrence Heiland, E. N. Lewis, Anna Lowe, Mary Wells, John H. Whitaker, Jr., Ludger Blanchard, as admr. with will annexed of Mary Laughlin decd., Chas E. Bronson, M. A. Bronson, R. H. Burt as admr. Est Geo M. Swan decd., Augusta La Fountaine, Flora S. Thacker, Emma G. Strong. Same solrs.

1139—T A A & N M Ry Co. vs The Penna Co., P. M. Arthur et al. Allowance of appeal,

1139—Same vs same. Bond \$1000. P. M. Arthur, J. H. Southard and G. M. Barber sureties, filed and approved.

1223—Thos. A. McDonald vs The Toledo Con. St. Ry Co. and city of Toledo; motion to make petition more definite and certain; C. F. Watts, solr.

1182—The Farmers L. & T. Co vs The T. A. A. & N. M. Ry Co; replication of Robt. C. Hobson to ans of receiver to his intervening petition; Harvey Scribner, solr.

1228—Wm. J. Comstock vs Oscar W. Irish, Thos P. Johnston, Josephine Johnston and Thos P. Johnston, trustee; foreclosure mortgage given by Oscar W. Irish to Henry Kahlo, land in VanBuren township, Putnam county, \$3000; King & Tracy, solrs.

1228—Same Co. vs. Same; stipulation for costs.

Common Pleas Courts

OF OHIO.

The following are among the important and interesting decisions of a recent date.

INSTALLMENT GOODS.

Suit to Recover Money Paid. Judgment for Defendant.

(Lucas County Common Pleas—Jan. Term.)

35644—Sherman Jeffries vs Draper & Nugent, error from Justice court.

HARMON, J.

Action involving contract for sale of goods on the installment plan, written agreement amounting to a mortgage. Statute regulating such contracts provides that seller cannot take back goods except by refunding the amount paid less a reasonable amount for the use of the goods, not exceeding 50 per cent of the

amount paid. In the case the party bought goods and had paid about half the purchase price of '70 when he wanted to move the goods away into Indiana. Seller refused to permit it and the goods were delivered to him to hold until purchaser should send for them. In about one year the latter wrote requesting the goods sent but without remitting the balance due. Subsequently the goods were sold to another party. First purchaser then brought suit to recover the amount paid on the goods. Justice rendered judgment for the defendant.

Exceptions were filed. The record indicated the facts stated but did not contain all the evidence. The court held there was no manifest error in the record and the petition in error was dismissed.

POLICY OF INSURANCE

Motion for Judgment on Pleadings. Condition Relative to Other Insurance. Allegation that Company Waived it Broad Enough to Defeat Defendant's Motion, Notwithstanding Other Conditions of the Policy.

(Lucas Co. Common Pleas—April Term.)

34556—Boehm vs Central O. Ins. Co. Action to recover on a policy of fire insurance. Motion by defendant for a judgment on pleadings.

M. G. Bloch for plaintiff.

Chittenden & Chittenden for defendant. LEMMON, J.

The petition is upon a policy of fire insurance. The answer sets forth one of the conditions of the policy which is, in substance, that if the insured shall, at any time during the life of the policy, procure, or cause to be procured, any other insurance on the property covered by the policy, said policy shall be void unless permission in writing for such other insurance shall be endorsed on said policy. The answer alleges that additional insurance was obtained; that plaintiff entered into such contracts without the consent of the defendants.

To this answer the plaintiff replies, admitting that the policy contained the

condition set forth in the answer and that plaintiff did procure other policies of insurance upon the same property, but alleges that said other insurance, so procured, was within the knowledge of the defendant company.

The attention of the Court, upon the hearing of the motion, was directed to another condition of the policy, which declares that no officer or agent of the company shall have power to waive any condition of the policy unless the same shall be done by endorsement thereon.

Held by the Court. The language of the reply is that *said defendant company waived the provisions of said policy by a verbal agreement entered into between plaintiff and one H. C. Miley, general agent of said company.*

The company certainly had power to waive or modify the conditions of its policy and the allegation is that it did so. It therefore becomes a matter of proof and incumbent upon the plaintiff to establish that the company waived the condition referred to. If the allegation had been that the agent waived the condition of said policy the motion would be granted, but the allegation is so broad that the court is prevented from granting the defendant's motion. Motion overruled.

ALLEGATION OF DEFECTS.

In Machinery and Repairs—Must be Specific.

35851—Jonte vs the Toledo Foundry & Mach. Co., motion to make petition more definite. Plff brought suit on the warranty of an excavator, alleging that the machine was defective. A second cause of action was to recover money expended in repairing it.

HARMON, J.

Court held that the petition should state specifically what the defects were and also indicate specifically what repairing was done; motion granted.

Sewer Assessment Invalid.

34371—Miller vs Toledo, action to en-

join the collection of a sewer assessment.
HARMON, J.

An original lot, afterwards subdivided, abutted on an alley in which a sewer had been constructed. Plaintiff owning one of the subdivisions had paid a proportion assessed against the whole of the original lot and had constructed a drain pipe into said sewer.

Subsequently the City proceeded to construct a sewer running at right angles with the first one and in the rear of the subdivisions of the original lot. In doing so tore up plaintiff's drain and assessed about \$35 as plaintiff's proportion of the costs of the last sewer.

Held by the Court:

That plaintiff had drainage already and could not be assessed for another sewer.

Injunction allowed.

UNASSIGNED DOWER INTEREST.

Conveyance, for Valuable Consideration, Held Good in Court of Equity.

(Lucas Co. Common Pleas Court—April Term.)

33989—Bausch vs McCunnell, et al. Action by a creditor of McCunnell's against McCunnell and Taylor to subject interest of McCunnell in the real estate of his deceased wife to the payment of a judgment heretofore obtained by plaintiff against McCunnell.

K. A. Flickinger for plaintiff.

Pratt & Wilson for defendant.

HARMON, J.

Taylor's wife was the only surviving child of McCunnell and his deceased wife McCunnell's interest in his deceased wife's real estate was never set out and assigned to him, but about one month before plaintiff's judgment was obtained McCunnell made a conveyance to Taylor of all his interest in his deceased wife's real estate, and plaintiff claimed that McCunnell could not transfer any interest in his deceased wife's real estate until after it was set out and assigned to him.

The Court held, that in equity, for a valuable consideration, the conveyance by McCunnell to Taylor of his interest in his deceased wife's real estate was effective, and passed to Taylor all the interest that he had. Plaintiff's petition dismissed.

New Laws.

STATUTORY AMENDMENTS.

Revised List of Statutory Amendments, Supplements and Repeals.

The following sections of the Revised Statutes have been amended, created and repealed by the present General Assembly up to the present date, May 4, 1894:

SECTIONS AMENDED.

67, 83, 118, 306, 560, 561, 563, 568, 644, 649, 698, 773, 845, 860, 950, 1137, 1305, 1511, 1526, 1546, 1548, 1708a, 1709a, 1713, 1718, 1808, 1939, 2107p, 2107q, 2107r, 2107u, 2113, 2121, 2235, 2269, 2473, 2495, 2506, 2507, 2508, 2509, 2510, 2658, 2670h, 2704, 2745, 2754, 2824, 2837, 2858, 2864, 2926h, 3085, 3184, 3188, 3193, 3194, 3195, 3197, 3200, 3212, 3213, 3235, 3260, 3280, 3591, 3605, 3641, 3656, 3660, 3784, 3827, 3898, 3904, 3908, 3950, 3959, 3961, 3987-1, 3991, 4002, 4017, 4022a, 4215, 4451, 4452, 4446c, 4460, 4477, 4513, 4527, 4567b, 4786, 4812, 4889, 4904, 4988, 4991, 5243, 5245, 5301, 5367, 5719, 6022, 6047, 6049, 6289, 6307, 6338, 6350f, 6454, 6709, 6816, 6817, 7177, 7246, 7284, 7285, 7428, 7429, 8447.

SUPPLEMENTAL SECTIONS CREATED.

306a, 475b, 594a, 897e, 897g, 897j, 897h, 897k, 968c, 1225a, 1448a, 1526a, 1655b, 1708b, 1708c, 1744b, 1785e, 1785f, 1797b, 2235a, 2264b, 2270d, 2702a, 3085a, 3185a, 3751a, 3821g, 4239a, 4451c, 4637a, 6159a, 6968c.

SECTIONS REPEALED.

2932, 2933, 3196, 3198, 3199, 3201, 3202, 3203, 3204, 445, 4458, 4877, 5163, 5164, 5165, 5166, 6454a.

COLUMBUS, May 2, 1894.

The following general laws have been enacted during the past week:

H. B. No. 427 is a new act which provides for the selection of jurors by the appointment in each county by a majority of the judges in the sub-division of such judicial district, of four persons who shall act as jury commissioners, whose duty it shall be to select the names of all jurors for their county. The law applies to all counties except Cuyahoga, Frank-

lin, Hamilton, Lucas, Montgomery and Mahoning.

H. B. No. 338 is a new law to prevent and punish frauds in sales of wearing apparel at public or private sale by itinerant vendors, and to regulate all such sales. It requires all itinerant vendors before selling or advertising to sell any articles of bankruptcy, insolvency, insurance or otherwise, to state under oath to the secretary of state the details of such bankruptcy, insolvency, etc., such statement to include all the facts relating to same. The fee is \$25; the law does not effect the right of municipalities to regulate licenses to peddlers or itinerant vendors.

H. B. No. 798 supplements section 897, by fixing the salary of commissioners of Licking county at \$1,200 per year.

S. B. No. 296 is a new law that grants women the right to vote for school directors, members of the board of education or school council.

H. B. No. 658 amends sections 2107p, 2107q, 2107r and 2107u, as amended March 19, 1887. The sections named relate to joint city and county, and county work-houses.

H. B. No. 760 repeals section 4877, relating to the care of roads in Clermont county.

H. B. No. 844 supplements section 892, fixing the salary of the commissioners of Fulton county at \$800; also for Columbi-ana county.

H. B. No. 254 is a new act making railroad companies responsible for damage by fires communicated from their property.

H. B. No. 916 amends section 2824, the provision being local and applies to Montgomery county.

H. B. No. 898 amends section 1808, relating to the salary of police clerk in Cincinnati.

H. B. No. 599 amends section 5 of an act passed March 30, 1892, to protect skilled labor, and for the registration of labels, marks, names or devices covering the products of labor associations of workmen or women, as follows:

Sec. 5.—Any person, or any officer, or

agent of any person, firm or corporation, who shall imitate or display for the sale or advertisement of any goods or merchandise any imitation of any label, mark, name, brand or device, which shall have been filed with the secretary of state and his certificate issued therefor, as provided in section 1 of the act of which this is amendatory, or shall use or display for the sale or advertisement of, or upon any goods or merchandise any genuine label, mark, name, brand or device, which shall have been filed with the secretary of state and his certificate issued therefor, as aforesaid, without authority derived from the union or association so filing the same, shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction, shall be fined not less than fifty dollars and not exceeding four hundred dollars, or imprisoned in the county jail for a period not exceeding six months, or both, at the discretion of the court.

H. B. No. 539 amends section 4786, relating to extra taxes. The amendment is of a local nature, and applies to Cincinnati.

H. B. No. 695 supplements section 2-270. The new section applies to Mt. Gilead.

H. B. No. 575 amends section 2704, by including a local provision for Cleveland.

H. B. No. 688 amends section 957, relating to county infirmary directors. The amendment abolishes the office in Huron county and vests the duties and powers in the county commissioners.

H. B. No. 732 supplements section 2-702 as follows:

Sec. 2702a. Provided, however, that nothing in said section 2702 shall apply to proceedings for the change of grade of a street or alley, or to appropriation of property for street or alley purposes.

COLUMBUS, O., MAY 9, 1894.

The following very important laws have been enacted and amended during the past week.

H. B. No. 21 amends section 1 of an act to authorize telephone companies to

place and maintain wires underground, as follows:

Sec. 1. Any company organized under the laws of this or of any other state, and owning and operating a telephone exchange, or doing a telegraph business, in any city in this state, may construct and maintain underground wires and pipes, or conduits and other fixtures for containing, protecting and operating such wires in the streets and public ways of said city, when the consent of such city has been obtained therefor, and it shall be unlawful for any corporation, company or individual to erect any telephone or telegraph pole or poles within that portion of any city in this state where subways have been constructed, except such poles as may be required for the purpose of distributing wires from said subways to subscribers, stations, and all such poles shall, so far as possible, be located in alleys; provided that this section shall not apply to existing telegraph companies until such companies shall have authority and sufficient time to construct subways; and whoever violates any of the provisions of this section shall be punished by a fine of not more than two hundred and not less than fifty dollars.

S. B. No. 95 amends section 5963 as follows:

Sec. 5963. If any provision be made for a widow or widower in the will of the deceased consort, the probate court shall, forthwith, after the probate of such will, issue a citation to such widow or widower to appear and elect whether to take such provision or to be endowed of the lands of the deceased consort and take the distributive share of the personal estate; and such election shall be made within one year from the date of the service of the citation aforesaid; provided, *that such widow or widower may, at any time before the period of such election has expired, file her petition in the court of common pleas for the proper county, making all persons interested in said will defendants to such petition, asking a construction of the provisions of said will in her or his favor, and to have the advice of said court, or of the proper appellate court on appeal*

thereon, and if proceedings for such advice, or proceedings to contest the validity of such will be commenced within such year, the widow or widower shall be entitled to make election within three months after such proceedings shall have been disposed of, and said will shall not have been set aside; but the widow or widower shall not be entitled to both dower and the provisions of the will in her or his favor, unless it plainly appears by the will to have been the intention that the widow or widower should have such provision in addition to the dower and such distributive share.

SECTION 2. And be it further enacted, that the provisions of section 5963, aforesaid, as amended herein, shall apply to any proceedings heretofore commenced and now pending in said court of common pleas or on appeal, and that this act shall take effect on its passage.

H. B. No. 405 amends section 453 as follows:

Sec. 453. When a judge of the circuit court is interested in any cause or matter pending in the circuit court of any county of his circuit, or is related to or has a bias or prejudice for or against either or any party to such cause, or has a bias or prejudice for or against any attorney of record of any party to such cause, or has sat in the lower court in the same cause or matter, or is otherwise disqualified to sit in such cause or matter, on the filing of an affidavit of either or any party to such cause or matter, or of his or her counsel setting forth the fact of such interest, bias, prejudice or disqualification, the clerk of the court wherein such cause is pending shall forthwith enter the fact of the filing of such affidavit in said cause on the trial docket of said court, and forthwith notify the chief justice of the circuit court, or if he be disqualified, as aforesaid, or be absent from the state or disabled in any manner, a judge of some other circuit who is qualified, who shall thereupon, make an order transferring, for the time being, the judge named in such affidavit, to another circuit in exchange for a judge of the circuit court of such other circuit, who is qualified to sit

in the trial or hearing of such cause or matter and designate and appoint said judge from such other circuit to take the place of the judge disqualified, as aforesaid, in the hearing of any such cause or matter where the same is pending; and the order therefor shall be entered upon the journal of said court, and the judge so designated to take the place of said judge disqualified, as aforesaid, shall proceed to perform the duties so assigned to him; and said judge disqualified, as aforesaid, shall not sit in the trial or hearing of said cause or matter. And whenever satisfied that the business of any circuit requires it, such chief justice shall assign any judge of the circuit court to hold court in a circuit other than that in which said judge resides.

H. B. No. 465 is a new act, and reads as follows:

Sec. 1. Be it enacted by the General Assembly of the State of Ohio, That all railroad companies operating any line of railway in the State of Ohio, upon demand of any person or corporation desiring to ship goods or merchandise of any kind in car lots, at any railway station or shipping point in the state of Ohio, shall count or check the packages composing each lot or car load, and furnish to the shipper of such goods a receipt or bill of lading, specifying the number of packages shipped in each car; and such receipt shall bind the railroad company so executing the same to deliver the same number of packages so specified, at the place of destination named in such bill of lading.

Sec. 2. Any railroad company, or any agent or officer thereof, refusing to comply with the provisions of this act shall be liable to a penalty of fifty dollars, to be recovered by civil action against the railroad company by which such agent or officer is employed, or to which such goods are offered for shipment.

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In Other States.

PROOF OF TITLE TO LETTERS PATENT.

Certification of Commissioner of Patents to Copy Assignment—How Far Evidence.

(United States Circuit Court of Appeals—Second Circuit.)

APRIL, 1894.

The American Cable Railway Company, appellee, vs. The Mayor, Aldermen and Commonalty of the City of New York and the City of Brooklyn, appellants.

A copy of an assignment of letters patent, certified by the Commissioner of Patents to be a true copy from the records of the Patent Office, if objected to at the time of offer, is not competent evidence of title.

Francis Forbes for appellants.

Charles Howard William, Daniel H. Driscoll and Edward W. Cady for appellee.

WALLACE, Circuit Judge.

The complainant's title to the letters patent in suit depends upon the authenticity of the mesne assignments under which it claims. No evidence was introduced tending to prove the execution of the assignments from the patentee to Horton, from Horton to the Cable Railway Construction Company, and from the Cable Railway Construction Company to the complainant, except duly certified copies of the Patent Office record of three instruments which purport to be such assignments. The objection that the instruments were not sufficiently proved was taken in due season, and was insisted upon at the hearing in the Circuit Court. We are of opinion that the objection was valid, and consequently that the complainant was not entitled to a decree.

The assignment of a patent is not a public document, but is merely a private writing. There is no statutory provision requiring it to be recorded in the Patent Office. Section 4898 of the Revised Statutes permits this to be done for the

protection of the assignee against a subsequent *bon fide* purchaser or mortgagee. The section does not make the recorded instrument evidence, does not require the assignment to be executed in the presence of any public officer or to be acknowledged or authenticated in any way before recording, and does not provide or contemplate that it shall remain subsequently in the custody of the office. It devolves upon the patent Office merely the clerical duty of recording any instrument which purports to be the assignment of a patent. We are aware of no principle which gives to such a record the effect of primary evidence or of *prima facie* proof of the execution or the genuineness of the original document. To give it such effect would enable parties to manufacture evidence for themselves.

Section 892 of the Revised Statutes does not touch the point. That section provides that written or printed copies of any records, books, papers or drawings, belonging to the Patent Office shall be evidence in all cases wherein the originals could be evidence. The original assignment does not belong to the Patent Office. The section makes a copy evidence of the same class as the original record, but has no application when the original record is not competent. The early cases of Brooks vs Jenkins (3 McLean, 432) and Parker vs Haworth (4 McLean, 370), in which it was held that a certified copy of the Patent Office record of an assignment of a patent is *prima facie* evidence of the genuineness of the instrument, were decided at first instance and apparently without much consideration. The rule of these cases has been accepted, without discussion, in the later cases of Lee vs Blandy (1 Bond, 361), Dederick vs Agriculture co. (26 Fed. Rep., 763), The National Folding Box & Paper co. vs American Paper Pail & Box co. (55 Fed. Rep., 488). It is not improbable that these decisions were influenced by the technical nature of the objection in the particular cases. But the rule opens the door to fraud, as any stranger can put an assignment upon record. And it imposes upon a defendant, who

honestly doubts whether a party who claims title to a patent is the owner, the burden which ought to rest upon his adversary.

Our conclusions are supported by the opinion of the Circuit court of Appeals in Payne vs Track (56 Fed. Rep., 233) where the question was considered with care, although its decision was unnecessary to the judgment.

We have not considered the point argued by the appellants that the bill should have been dismissed because no proof was given of the complainant's incorporation. The assignment of errors does not present the question.

Although upon the proofs in the Circuit court the complainant was not entitled to a decree, it would have been a proper exercise of discretion on the part of the court, in view of the reliance which the complainant had doubtless placed upon the adjudications which have been referred to, to permit the complainant to reopen the proofs and the cause to be reheard.

In reversing the decree and directing the dismissal of the complainant's bill, we do so without prejudice to the granting by the Circuit court of such an application, if seasonably made by the complainant.

The decree is reversed, with instructions to the Circuit court to proceed in conformity with this opinion.

LACOMBE and SHIPMAN, J J., concur.

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TOLEDO, OHIO.

BOYCOTT CIRCULARS.

Injunction Against Issue of a Boycott Circular
Vacated.

Supreme Court of New York—General Term.
First Department.

APRIL, 28-94.

Present: Hons. Charles H. Van Brunt,
P. J.; Morgan J. O'Brien and David L.
Follett, J. J.

Leopold Sinsheimer et al, respondent,
v. United Garment Workers of America,
appellant.

Combinations for the assertion of rights
or protection against wrongs are legal, and
not the subject of injunction unless they
infringe upon provisions of law.

Courts of equity will be studious to see
that the rights of all parties are protected,
and that the forms of law are not permitted
to be used on behalf of one party against
another, when the party seeking
the intervention of the Court has been endeavoring
to secure his ends by means
similar to those which he seeks to enjoin
on the part of his antagonist.

It appeared that difference had arisen
between members of a combination of
clothing manufacturers, formed ostensibly
for mutual protection against unjust demands
of workingmen, with a secret purpose
to break down, if possible, any organization
by operatives for the purpose of
advancing wages and protecting themselves
in their employment, and a combination
of workingmen, organized for the
purpose of advancing the rate of wages
and for mutual protection against employers,
arising out of certain strife between
plaintiff's firm, members of the
former combination, and their workingmen.
A resolution was adopted by the
manufacturers to lock out in all their
shops all operatives who belonged to defendants'
association, and defendants' as-

sociation retaliated with a boycott, and the
issue of a circular directed to tradesmen
in various cities, seeking to bring about
their discontinuance of trade with members
of plaintiffs' organization, until such
plaintiffs' organization should adjust matters
with defendants' association.

Held, That a preliminary injunction
should not have been granted, as defendants'
act in issuing such circular was not
in violation of any law, but, under the
circumstances, was a legitimate weapon to
be used in the warfare then going on between
the two combinations.

Held further, That the defendants had
the right to adopt a course similar to that
pursued against them; that if they were
guilty of any violation of law, the plaintiffs
were equally implicated, and that, as
plaintiffs did not come into Court with
clean hands, equity would not intervene.

Appeal from an order granting a motion
restraining the defendants, individually
and in their respective capacities, from
issuing circulars directed against plaintiffs
to tradesmen in various cities requesting
the discontinuance of trade with plaintiffs
and from boycotting plaintiff, or in any
manner interfering with their business.

A. L. Fromme (of counsel) for appellant;
Wm. N. Cohen (of counsel) for respondent.

VAN BRUNT, P. J.—It is exceedingly
difficult to determine what the precise
facts are from the examination of the papers
submitted upon this appeal. The
complaint and affidavits upon the part of
the plaintiff contain allegations as of the
personal knowledge of the party verifying
the same of which it is apparent that such
party could not have had such knowledge.
The affidavits also contain allegations of
conclusions drawn from letters which are

not produced, which method of allegation has been often enough condemned. The affidavits and answer of the defendants are subject largely to the same criticism. What the true facts are in reference to the claims of the two parties to this action can only be established upon the trial of the issues involved, when assertions without knowledge can be sifted from the case, and conclusions reached based upon legal testimony.

The main facts in reference to which there seems to be sufficiency of legal proof are that the plaintiffs formed part of a combination of clothing manufacturers, having for its ostensible object protection from unjust claims upon the part of their operatives, with a secret purpose to break down, if possible, any organization made by operatives for the purpose of advancing wages and protecting themselves in their employment. The defendant, upon the other hand, is a combination of operatives associated together for the purpose of protection against the exactions of employers, the advancement of their wages and the compelling of employment of only those persons who belong to their association. Naturally, the interests and purposes of these two associations lead to contest and strife. I know of no law which prevents combinations either for the assertion of rights or protection against wrongs, as long as the acts of such associations do not infringe upon the provisions of law.

Various differences had arisen between the plaintiff and the defendants; negotiations were had; claims of bad faith upon both sides were advanced, and the result was the issuance of circulars by the defendants, some time prior to the commencement of this action, to tradesmen in other cities, complaining of their treat-

ment by the plaintiffs and others, and substantially asking that they discontinue trading with them as long as this condition of affairs existed. And, finally, in March, 1893, the clothing manufacturers adopted a resolution (claiming bad faith upon the part of the operatives and that a strike had been ordered in the shop of one of the members of the association) that unless the operatives receded from their position, all persons in their employ belonging to the association of operatives should be discharged.

An action was subsequently commenced by the members of the Clothing Manufacturers' Association collectively against the defendants for the relief prayed for in this action, which was denied, and a motion made for an injunction upon the ground of misjoinder of parties. Thereupon, in April, this action was commenced, and a motion for an injunction argued in June and decided in November.

I fail to see how the injunction in this action can be sustained. There is no proof of any acts of violence upon the part of the defendants, or of any injury to property, or of any threats or intimidation. At best the circulars were but one of the instruments used by the defendants in their contest with the association of which the plaintiffs were members. It was a pursuing of precisely the same course against the Manufacturers' Association as the Manufacturers' Association were urging against them. The Manufacturers' Association claimed the right that their members should discharge from their employ all persons connected with the defendants' association unless they receded from certain demands made upon one of their members. The defendants notified persons engaged in the trade of the controversies which were existing, and virtually re-

quested such persons not to deal with the plaintiff's firm unless such differences could be adjusted. I fail to see that there is any infringement of any provisions of law in the issuance of such a circular.

It is further to be observed that at the time of the argument of this motion and subsequent to the beginning of the action it would appear that the differences between the plaintiffs and defendants had been adjusted, and an agreement entered into; and there is no proof that any of the circulars affecting the plaintiff's firm were issued by the defendants for some time prior to the commencement of this action; and the intention to issue such circular is expressly denied. It is true that in one of the affidavits read upon the part of the plaintiffs it is said that certain circulars were distributed through the mails as late as the 27th of May, 1893. But it is not claimed that any of these circulars were issued in respect to the plaintiff's firm; nor is there any legal evidence that any such circulars were distributed at all. It is at most heresay, and there is no reason whatever given for the failure to produce the affidavit of some person who had personal knowledge of the facts. And, as already observed, this seems to be a feature which characterizes all the papers upon this application.

It seems to me obvious that the clothing manufacturers had a right to lock out all operatives connected with the defendant's association because of demands which they considered unjust made by the defendant upon one of their number; and that the defendant had an equal right to endeavor to persuade those who had been accustomed to deal with members of the manufacturers' association to discontinue their trade.

It is a familiar principle in equity that

the plaintiff must come into Court with clean hands. Under the circumstances disclosed by the papers in this case, if the defendants were guilty of any violation of law the plaintiffs were certainly equally implicated; and under this condition of affairs it is difficult to see how they would have the right to the intervention of a Court of equity. In dealing with questions of this nature, the Court should be studious to see that the rights of all parties are protected; and that the forms of law should not be permitted to be used on behalf of one party against another, when the party seeking the intervention of the Court has been endeavoring to secure his ends by means similar to those which he seeks to enjoin on the part of his antagonist.

Upon the whole case, therefore, I am of the opinion that the injunction should not have been granted, and the order appealed from should be reversed, with \$10 costs and disbursements, and the motion denied with \$10 costs.

FOLLETT, J., concurs.

O'BRIEN, J. (concurring).—I concur in the result. The assertion of a right or the attempt to redress a wrong on the part of either employer or employee is legal and proper. When the means employed, however, are unlawful, the Courts will intervene.

If the plaintiffs here can show that, while legally asserting their rights as employers, their business has been unlawfully interfered with by the defendants to an extent entailing grievous and irreparable injury, then I think there would be presented a case wherein the Court could by injunction restrain the unlawful means employed. From the affidavits used upon the motion, I do not think that either of these propositions sufficiently appears

to justify an injunction during the pendency of the action. That the plaintiffs were entirely without fault is by no means made evident, nor at the time the injunction was granted was the threatened injury serious. The defendants having denied under oath any intention to issue any more circulars, and none have been issued since those complained of in the prior action, there was little, if any, necessity for a preliminary injunction, and no injustice would have resulted if the questions at issue had been reserved until the trial.

Without expressing an opinion, therefore, as to whether, upon the facts here alleged, an injunction could or could not issue, I am of opinion that upon the evidence on which the motion was made the preliminary injunction should not have been granted, and I concur, therefore, in the reversal. N. Y. Law Journal.

EASEMENTS OF LIGHT AND AIR.

Testimony of Ordinary Witnesses Competent on the Question of Interference With Light.

SUPREME COURT—NEW YORK—GENERAL TERM.

FIRST DEPARTMENT.

April, 1894.

Present: Hons. Charles H. Van Brunt, P. J.; Morgan J. O'Brien and David L. Foltz, J. J.

Joseph B. Rose, appellant, vs David Stewart and others, Trustees of the London and Lancashire Fire Insurance Company, respondents.

Appeal from a judgment dismissing the complaint, with costs, entered on a decision of the Special Term.

This action was begun on December 26th, 1890, to recover a judgment per-

petually restraining the defendants from erecting and maintaining in a yard structures obstructing light and air from entering plaintiff's building from said yard. On the 13th of November, 1882, Nathaniel G. Carnes was the owner of Nos. 42 and 44 Cedar street and of Nos. 57 and 59 William street, the rears of which lots abutted. No. 44 was then wholly covered by a brick store, and there was a brick store at No. 42, about fifty feet deep north and south, leaving a yard about thirty feet long north and south and about thirty-five feet wide east and west, which abutted Nos. 57 and 59 William street on the west. At this date Lynde Catlin owned No. 40 Cedar street, which was abutted on the south partly by Carnes' William street property and partly by said yard. November 13th, 1832, Carnes and Catlin mutually executed a contract (duly recorded November 16th, 1832, in the office of the Register of the City and County of New York, in Book 289 of Conveyances, at page 449) which contains among other recitals and covenants, the following:

"Whereas the said Lynde Catlin is desirous to have the use of the privy in the yard of the stores of the said Nathaniel G. Carnes, in common with the tenants of the surrounding stores, and also to use and enjoy the light and air appertaining to said yard for his said store now erecting as aforesaid, as will appear by the map hereto annexed. * * *

"And the said Nathaniel G. Carnes does hereby give and grant unto the said Lynde Catlin, his heirs and assigns, the use, benefit and advantage of the privy in the yard of the stores of the said Nathaniel G. Carnes on William street aforesaid, in common with the tenants of the surrounding stores, and also the use,

benefit and enjoyment of light and air for the said store of the said Lynde Catlin, so far as the same in common belongs and appertains to the yard aforesaid. *

* *

*"That in no case or under any pretense shall the said Lynde Catlin, his heirs or assigns, be deprived of the use or privilege of access to and use of the privy therein, or the light and air as contemplated to be granted to or enjoyed by the said Lynde Catlin, his heirs and assigns. * * **

"And it is further mutually covenanted and agreed by and between the parties to these presents that the triangular piece of ground in the rear of the lots Nos. 40 and 42 Cedar street, as delineated on the plan or map hereunto annexed, shall forever remain open for light and air, excepting that the said party of the second part (Catlin) reserves to himself, his heirs, administrators and assigns, the right to enclose the ground belonging to him, and said party of the second part (Catlin) with an iron railing, and of putting steps to descend into the yard from the first or principal story of his building on said lot, No. 40 Cedar street."

The ground embraced within the yard and owned by Catlin was a small triangular piece containing less than thirty square feet. The plaintiff had acquired No. 42 Cedar street, except a small triangular piece on the southeast corner of that lot forming part of the yard, through mesne conveyances, subject to said covenants. The Court found:

"Ninth. That the defendants, prior to the commencement of this action, erected and are now maintaining in said yard, in immediate proximity to the rear wall of the building on the premises Nos. 57 and 59 William street, an iron cylinder or pipe of the diameter of about two feet,

which extends from the ground in said yard to a point about two feet above the top of the rear wall of the building on the premises Nos. 57 and 59 William street, a height of about one hundred and fifty feet; and that the defendants, prior to the commencement of this action, also erected and constructed, and are now maintaining in said yard, two sky lights or ventilating shafts, one of which is seven feet eight inches long by six feet five inches wide and four feet six inches in height, and the other of which is three feet seven inches long by four feet wide and four feet five inches in height.

"Tenth. There is no evidence that the said iron cylinder or pipe, or said sky-lights substantially interfered with or obstruct the use, benefit or enjoyment, of the light appertaining to the yard in the rear of the premises Nos. 57 and 59 William street for the premises of the plaintiff No. 42 Cedar street."

The Court found the following conclusions of law, the first and second upon the plaintiff's request, the last upon the request of the defendants:

"First. That the plaintiff at the time of the commencement of this action was, and still is, entitled to the use, benefit and enjoyment of the light and air of the said yard, so far as the same in common belonged and appertained to the said premises No. 42 Cedar street, in the City of New York.

"Second. That the plaintiff is entitled to the use, benefit and enjoyment of the light and air of the said yard, which fell in and upon the said premises, No. 42 Cedar street, as said light and air had existed prior to the erection of said cylinder or pipe and of said sky-lights."

"The defendants are entitled to judgment against the plaintiff dismissing the

complaint herein with costs, and I order and direct judgment accordingly."

The plaintiff has not excepted to the ninth finding, but has to the tenth, and by six requests asked in various forms the Court to find the converse of the tenth finding, which requests were refused and exceptions filed. The plaintiff also excepted to the last conclusion of the law above quoted, and requested the Court to decide that the plaintiff was entitled to the judgment prayed for, which was refused and an exception filed.

J. Tredwell Richards for appellant; William Allen Butler for respondents.

FOLLETT, J.—The questions raised on this appeal arise on the exceptions filed to the findings and refusals to find facts, and the exceptions to the conclusions found and refused, and upon the exceptions taken to the exclusion of testimony offered by the plaintiff. The exceptions to the facts found and refused, and the exceptions to the conclusions of law found and refused, are not argued, but those taken to the exclusion of testimony are argued and relied on as grounds for a reversal of the judgment and for a new trial. The evidence contained in the record sustains the facts found and the conclusions of law, and fully justify the refusals to find facts and conclusions requested by the plaintiff. The only questions remaining to be considered are whether the testimony offered by the plaintiff and rejected by the Court upon the defendant's motion was relevant to the issues, and if relevant and believable, would it have justified a judgment for the plaintiff?

Thomas M. ... a witness called and sworn in behalf of the plaintiff, testified that he was a steel plate photographer and printer, and occupied the second and

fourth floors of 42 Cedar street (plaintiff's premises) before and since the erection of the structures complained of. He was asked:

"Q. Did you have occasion after that pipe was put up to notice the relative amount of the light you received after it was put up as compared with what you received in that easternmost window?

"Mr. Butler—I object to it as calling for a conclusion of the witness.

"Objection sustained. Exception.

"Q. Did you notice at any time after the standing pipe was put up the light which comes in in the easternmost window on your premises?

"The witness—Yes.

"Q. What, if anything, did you notice?

"Mr. Butler—That is objected to.

"Sustained. Exception.

"Q. Had you noticed the quantity of light which came in that window before the standing pipe, smokestack in the rear of 57 and 59 William street, was put up?

"Mr. Butler—I object to it on the ground that the witness has no means of determining; he is not an expert.

"Sustained. Exception.

"Q. State whether after the erection of the standing pipe in the rear of the premises Nos. 57 and 59 William street you observed any diminution of light coming in your easternmost windows; if so, state to the Court how much the diminution was as near as you can?

"Objected to on the same ground. Sustained. Exception.

"Q. State any facts in regard to the light coming in those windows before and after the erection of this standing pipe and what were the differences?

"Mr. Butler—We object to it on the ground that it calls for certain facts; he may state what the facts were at any time

before and after; for him to determine whether there is a difference is objectionable.

"Sustained. Exception."

Like facts were offered to be proved by this witness at folios 123, 125 and 135, and by John M. Coonan at folios 99, 100, 101, 106, 107 and 108, and by James B. Rose at folios 112 and 113, which were excluded on the objection of the defendants. The exclusion of this testimony was error. The vital issue of fact by which the rights of the litigants were to be determined was whether the defendants' structure deprived the plaintiff's building of "the light and air contemplated to be granted to or enjoyed by the said Lynde Catlin, his heirs and assigns." The witness McMullin occupied part of the plaintiff's building before and since the erection of the structures complained of and was engaged in an occupation requiring light, and his business qualified him to judge of the quantity and quality of light received from the courtyard before and since the erection of the structures objected to. It is not necessary that a witness should be a scientific expert, capable of accurately measuring the quantity of light and determining by scientific processes its quality, to qualify him to testify as to whether less light and of a poorer quality was enjoyed after a certain event.

The judgment should be reversed and a new trial granted, with costs to the appellant to abide the event.

VAN BRUNT, P. J., and O'BRIEN, J., concurred.

SUPREME COURT OF ILLINOIS.

9-9.—Josiah W. Provart et al vs. Emily Harris et al.

Opinion by Shope, J., affirming.

Filed at Mt. Vernon, April 2, 1894.

1. Deed—Delivery essential. — Delivery is indispensable to the validity and operation of a deed. That is the final act on the part of the grantor, by which he consummates the purpose of his conveyance and without it all other formalities which have preceded are impotent to render it effectual as an instrument of title.

2. Same—Delivery how made or shown. The law prescribes no formulary to be pursued in making delivery of a deed, and it may be done "by acts without words or by words without acts or by both." It may be "either actual by doing something and saying nothing, or else verbal, by saying something and doing nothing, or it may be by both but it must be made by one or both ~~these~~ ways, for otherwise though it be never so well sealed and written, it will be of no force.

3. Same—Delivery without actual possession of grantee.—While it may not be essential in all cases that the deed shall be delivered into the actual possession of the grantee, it is indispensable that the deed shall pass beyond the dominion and control of the grantor. Until the grantor parts with all control over his deed that of his grantee does not attach. If the grantor retains control over his deed it will be ineffectual for any purpose as a conveyance.

4. It is absolutely essential that the acts done, or words spoken or both, shall clearly manifest an intention on his part that the deed shall presently become operative to convey the estate therein described, to the grantee, and that he has parted all dominion and control over it.

5. So long as a deed is in the hand of a depositary, subject to be recalled by the grantor at any time, the grantee has no right to it, and can acquire none; and if

the grantor dies without parting with the control over the deed, it has not been delivered during his life, and after his decease no one can have the power to deliver it.

6. A party in his last illness being desirous of disposing of his property had a scrivener called in whom he directed to draw five deeds to five of his sons and his will. The deeds were drawn, signed and acknowledged and laid on a table in an adjoining room where they were found after the grantor's death. After the making of the deeds the scrivener commenced to write the will, but the grantor being too weary to proceed, he requested the scrivener to call next morning. The scrivener as he was leaving, asked the grantor if he should take with him the deeds, who said "no, let them stay where they are." He said to a pastor, a friend, on the day the deeds were drawn, that he wanted to make the deeds for his boys, and that if he did not get better, he wanted the pastor to take the deeds and have them recorded. The grantor died before the next morning leaving the deeds on the table where they were placed by the draftsman. *Held* that there was no delivery of the deeds to the grantee therein named.

SUPREME COURT OF PENN.

Character of Oil Leases—Rights of devisees in Royalty.

The Supreme Court of Pennsylvania (28 Atl. 934) has held that under an oil lease of three contiguous farms, embracing some 600 acres, if the lessor dies and devises the farms to different persons the devisees are entitled to share alike in the royalty reserved, though the wells are all on one farm as through

such wells the oil may be drawn from all the farms.

The Court said in part: "The lessor died in October, 1890. By his last will and testament he gave one of these farms to each of his three children in fee, making no mention of the lease, which included them all. The devisees have entered into possession of their respective farms under the will of their father, and each holds in severalty. The holder of the oil lease has, meantime, put down several oil wells, and is producing oil therefrom. These wells happen to be on the farm devised to James T. Gormley, the defendant, and he claims the entire royalty. The question is thus seen to be, who is entitled to the royalty reserved by the ancestor? Should it be divided between the three devisees in proportion to the acreage held by each, or should it be paid to James T. alone? The answer to this question must depend partly upon the character and legal effect of the lease, and partly on the nature of the product obtained under it. If the lease had been the ordinary agricultural lease, reserving a fixed annual rent payable in money, it would not be doubted that the fee descended to the devisees subject to the estate for years held by the tenant. The lessor could not change the rights of the lessee, or disturb his covenants, by a division of the land into parts, and a devise of these parts to separate devisees. All the devisees together take the place of the divisor, and receive the rent due as an entire sum from the tenant. It

would not matter that the grain was grown on one of the divisions, the grass upon another, while the third was unimproved and covered with forest: their interests would be several as to each other under the terms of the will, but as to the tenant they would be undivided under the terms of the lease made by their ancestor, and covering the land at the time of his death. But this was not an agricultural lease. It was an agreement known as an oil lease. It conferred an exclusive right upon the tenant to take the oil that might underlie the whole 600 acres, and gave him 15 years within which to take it. It was, in its legal effect, a sale of the oil, for the removal of which the surface and the sub-surface were subjected to the necessary servitudes. The subsequent division of the body of land by the lessor could not divide or diminish the privileges of the lessee or change his covenants. The lessee may locate his wells where he pleases, regardless of the interests of the devisees of his lessor. He may distribute them over the 600 acres, or locate them all on one of the divisions. He may crowd the lines of the adjoining divisions so as to enable him to draw the oil from them without drilling upon them, and in this manner deplete, ultimately, the whole territory by operations conducted on the farm of one of the devisees. It is well understood among oil operators that the fluid is found deposited in a porous sand rock, at a distance ranging from 500 to 3,000 feet below the surface. This rock is saturated throughout its extent with oil,

and when the hard stratum overlying it is pierced by the drill, the oil and gas find vent and are forced by the pressure to which they are subject into and through the well to the surface. After this pressure is relieved by the outflow the wells become less active. The movement of the oil in the sand rock grows sluggish, and it becomes necessary to pump the wells in order both to quicken the movement of oil from the surrounding rock, and to lift it from the chamber at the bottom of the well to the surface. An oil or gas well may thus draw its product from an indefinite distance, and in time exhaust a large space. Exact knowledge on this subject is not at present attainable, but the vagrant character of the mineral, and the porous sand rock in which it is found and through which it moves, fully justify the general conclusion we have stated above; and have led to its general adoption by practical operators. For this reason, an oil lease partakes of the character of a lease for general tillage rather than that of a lease for mining or quarrying the solid minerals. In the case of a coal lease, for example, the exact location, with reference to lines on the surface, of every pound of coal taken, may be easily determined. The stratum of coal is as fixed and permanent in its character as are the strata of superincumbent rocks and earth. Its ownership as between several devisees or heirs at law after partition made, is as easily determined as that of the surface. The removal of the coal from one part does not diminish or disturb that which

underlies another. The lines that divide the surface divide, with absolute fairness to all concerned, the subsurface, and secure to the several owners with certainty the mineral that belongs to each. The rules applicable to coal leases, or leases of land containing any other solid mineral, are, therefore, not always capable of application to leases for the production of oil or gas, because of the difference between the solid and fluid minerals, and because of the deficient conditions under which they are found and brought to the surface. There is in this state no precedent that we are constrained to follow, and we cannot find that the question has been decided in any other of the oil-producing states. We are in a position, therefore, to consider and determine it on principle."

FINDINGS OF MASTER.

Conclusive as the verdict of a Jury.

Appellate Court.

OPINION FILED MAY 1894

GEORGE A. WHITCOMB V ALICE A. DUELL ET AL

Appeal from the Circuit Court of Cook County, Illinois.

The findings of a master in chancery in matters referred to him, in regard to the facts established by the testimony, are as conclusive upon the parties as the verdict of a jury in a civil cause, and will be reviewed or set aside only for the same reason that a verdict would.—[ED. CHICAGO LEGAL NEWS.

MR. JUSTICE GRAY delivered the opinion of the court.

This is a bill filed by the appellant to foreclose a mortgage made by Duell to O.

F. Woodruff, to secure her note to him, which note Woodruff assigned to the appellant. The defense was that the note was given without consideration, which, if true, is conceded to be a good defense to this foreclosure suit: *Mullsuphy vs Scott*, 135 Ill. 655; *Scott vs Magloughlin*, 133 Ill. 33.

On reference to a master he found that the note was given for a consideration. The court sustained exception to the report and dismissed the bill. The cause is presented to us exactly as it was to the Circuit Court. The judge there did not see the witnesses, did not hear them testify, so that there is no presumption in favor of the decision there based upon the opportunity of judging of credibility.

That Woodruff had been the attorney of Duell in a great deal of litigation is proved without denial; that he had been paid for his services except in one suit is not pretended; that his services in other cases were very considerable is proved; that she wanted further services which he declined to render without a settlement, both she and he testified, and that as a result this note was executed is also proved by both of them.

Under all the evidence shown by the record, the terms and amount of the note were not ungenerous toward her. On all disputed questions of fact "where there is evidence tending to establish the facts found, neither the court of chancery nor the Supreme Court on appeal will review the findings in regard to the weight to be given the testimony. The findings of a master in matters referred to him, in regard to the facts established by the testimony, are as conclusive upon the parties as the verdict of a jury in a civil cause and will be reviewed or set aside only for

the same reason that a verdict would be. Howard v Scott, 50 Vt. 48.

This rule was not observed in this case and the decree is reversed and the cause remanded with directions to vacate the order sustaining the exceptions to the master's report and overrule them, and enter a decree in accordance with the report.—Chicago Legal News.

Sixth Judicial Circuit.

JUDGES.

Hon. C. S. Bentley, Bryan, O.

Hon. G. R. Haynes, Toledo, O.

Hon. C. H. Scribner, Toledo, O.

MISCONDUCT OF JURY.

Occupation of House Does Not Necessarily Imply Acceptance of Same as Built According to Contract—Payment After Work Ceased of an Amount Exceeding Contract Price—Owner Not Estopped from Subsequently Bringing Suit for Damages.

(Lucas County—January Term.)

731—Henry Bender vs. Ulrich Buehrer.

Kinney & Newton for Plff.

Murphy & Dotson for Deft.

Opinion by Bentley, J.

The plaintiff sued the defendant on an account for certain work and labor alleged to have been performed by the plaintiff for the defendant at his request, in the construction of a house and the making of certain shelving, etc., therein. The defendant denied the account and alleged that there was a contract between the parties whereby the plaintiff was to build for the defendant a house like that of a certain other party named in the contract, which contract included the work charged for in this action, and that said house was to be built for a certain

gross sum, and was to be completed by a certain time named, but that the plaintiff had not completed the house in time, and had not built it as large as the said model house, and had failed to comply with the contract in certain other particulars, and alleged that the defendant had suffered damages thereby in a certain amount, but had paid the plaintiff a sum in excess of the contract price. The reply denied these allegations of the answer, and set up that the defendant, knowing the several matters as to which he now asks damages, made payment of the full amount of the contract and accepted said house, and took possession thereof, and that therefore he cannot now recover damages for the alleged non-fulfillment of the contract by the plaintiff. On the trial evidence was given by each of said parties tending to support their respective claims, and the court, on motion, ordered that the jury view the said house, and the jury were taken for such view under the charge of a bailiff. The court instructed the jury, in effect, that they should make a careful view of said house and might take measurements, and that the facts bearing upon the issues which they should ascertain in and by said view might be considered by them *as evidence* in the case. The jury returned a verdict for the defendant, and assessed his damages at a certain sum. Within the time allowed by law the plaintiff filed his motion for a new trial, and, among other causes, assigned misconduct of said jury and of said defendant. On the hearing of the motion for a new trial, the

plaintiff offered, and the court received and considered two affidavits showing that while said jury were thus viewing said house of the defendant he, in the absence of the plaintiff, spoke to them, stating as facts certain material matters in issue in the case, and then asked said bailiff if he might treat the jury, and said bailiff thereupon answered, "Yes, the jury are now discharged and can go where they have a mind to and can do as they please." Thereupon the defendant offered to treat the jury, and a majority of the jury were treated by him to beer and cigars twice around. Afterwards the jury returned said verdict into court. The said two affidavits were the only evidence offered by either party on said motion.

Held by the Circuit Court:

1—That whether it was or was not proper to instruct the jury that they might take measurements, the record does not show that they took any measurements other than of dimensions as to which there was no practical dispute between the parties, and hence the plaintiff was not prejudiced by the instruction, and so far as said instruction allowed the jury to take into consideration *as evidence* matters apparent to them upon a mere view, it was not clearly erroneous. (See 12 A. & E. Cy. of Law, 367 et seq.; 27 Ia. 503; 15 Pick. 209; 52 Ind. 117; 40 Ind. 545; 105 Ind. 281; 49 Cal. 609; Wharton's Ev. 346; 59 Wis. 364; 47 Mich. 456; Thompson on Trials, 895; 49 O. S. 416; 19 Bull. 258; 3 O. C. C. 630; 1 O. C. C. 135; R. S. Secs. 5191, 6428, 7283.)

2—That the Court of Common Pleas did not err in instructing the jury in substance that the mere occupation by the defendant of the house, built upon his land, did not necessarily imply an acceptance by him of the house as being built according to the terms of the contract, and that the payment by the defendant to the plaintiff, after the latter had ceased work on the house, of a sum of money, which, with prior payments, exceeded the original contract price for building the house, would not estop the defendant from recovering damages for defects in said work of which he might have known at the time of such payment, by way of counterclaim in an action by the plaintiff to recover alleged extra work on said house where it is not shown that the defendant himself made or directly authorized such last payment.

3—That said acts specified in said affidavits constituted misconduct of said defendant and said jury, and being wholly uncontradicted, said Court of Common Pleas erred in refusing a new trial therefor.

Judgment reversed and verdict set aside.

ATTORNEY FEES IN MORTGAGE.

Motion to Strike Out Allegation Brought to Final Hearing of the Case.

(Lucas County—January Term.)

Joseph Kesting vs Lena Donahue, et al. A motion is presented to the Court in this case for an order striking out certain allegations in the cross-petition of the Mutual

Building and Loan Co., made for the purpose of enforcing the alleged contract of its mortgagor to pay its attorney's fee in this action (which is one to marshal liens of mechanics and others, including that of the Loan company, by way of mortgage on certain lands).

Held by the Circuit Court; That the consideration of the questions presented by the motion more properly arise on the final hearing of the case and, without prejudice to the right of parties to raise the question then, the motion is overruled.

DEFECTIVE CAR.

Railway Co. Presumed to Have Knowledge.
Construction of act of 1890 Ohio Laws Page 149.
Lucas County—January Term.

Pennsylvania Railway Co. vs Joseph D. Meyers, and The Lake Shore & Michigan Southern R. R. Co. vs Joseph D. Meyers.
E. W. Tolerton and E. D. Potter Jr. for plaintiffs in error.

Scribner and Hurd for defendant in error

Petition in error to reverse the judgment of the court of common pleas. Plaintiff below, an employe of L. S. & M. S. Ry. Co., was injured by the giving way of a hand hold on a car in company's yard at Toledo, which car had come into its possession from the Pennsylvania Co. at Erie, Pa. Suit was brought jointly against both companies and a joint judgment rendered against them. The car belonged to the Pennsylvania Co. and was inspected by the servants of said company when delivered at Erie, Pa., to the Lake Shore Co. and by the Lake Shore Co.'s inspector also inspected when received and was also again inspected by the Lake Shore Co.'s inspector at West Detroit, where the car was received from the Michigan Central Ry. Co. to whom it had been delivered by the Lake Shore Co., under the consignment made by the Pennsylvania Co. The Pennsylvania Co. claimed

that if there was any liability to the plaintiff below, the liability was that of the Lake Shore Co. only, who had sole possession and care of the car at the time of the injury received by plaintiff below. This court holds, that the Pennsylvania Co. is rightfully held liable by reason of the condition of the car at the time it was loaded and sent out upon its journey by the Pennsylvania Co. No evidence having been given to show that that company had ever overhauled or examined said car to ascertain its condition or fitness for use prior to its arrival at Erie, Pa. Testimony showing that the car had been built some sixteen years and had been in use by the Pennsylvania Co. for thirteen years; the evidence further showing that the woodwork about the handhold which had given way was in a very decayed and defective condition so that it would not hold the screws, and evidence of such decay was visible, and that the screws securing the handhold were only long enough to go through the outer roof board which was of softer wood and cracked and decayed with long exposure to the weather.

In regard to the Lake Shore Co. it claims that it had the car inspected when it received the same at Erie, Pa., and again at Detroit, Mich., and that it had fully performed its duty in that regard and had no knowledge of the defective condition of the car and that its inspectors had not been guilty of negligence in inspecting the car. That under the rules of law laid down by the supreme court in the Fitzpatrick case, 42d Ohio state, it is not liable to its employe, plaintiff below, and that if there was any negligence it was the negligence of a co-employe to wit: the inspector. On the other hand counsel for the defendant in error relies upon the act of the General Assembly of Ohio, see Ohio laws 1890, page 149, section 2, which section provides, among other things, that when an employe of the railroad company operating a car in Ohio is injured by a defective attachment upon a car, such corporation shall be deemed to have knowledge of such defect before and at the time such injury was so

sustained, and when the fact of such defect shall be made to appear in the trial of any case in the courts of this state, brought by such employe on account of such injuries so received, the same shall be *prima facie* evidence of negligence on the part of such corporation. Held, that the true construction of said statute is that said fact of defect being proved, it shall be *prima facie* evidence of knowledge of such defect and negligence on the part of the corporation, but the corporation may rebut such *prima facie* evidence by showing that it had no such knowledge and was not guilty of negligence, and in support of such claim on its part, it may show that by careful and vigilant inspection of the car in question by competent inspectors when it received said car, no such defect had been discovered. Held further, under the facts of this case that the jury were warranted in finding that sufficient inspection and examination had not been made by the defendant corporation to rebut the *prima facie* evidence of knowledge and negligence imputed to it by the statute in question.

Claim is made that the damages awarded by the jury are excessive. Upon careful review of the testimony this court holds that there is nothing in the same to show that the jury were actuated by passion or prejudice in assessing damages. Judgment is therefore affirmed.

Supreme Court.

SUPREME COURT PROCEEDINGS.

General Docket.

TUESDAY, May 1, 1894

2737—The Phoenix Insurance Co. of Hartford, Conn. vs Lewis Harris, error to the Circuit Court of Clinton County. Judgment affirmed.

2747—The Cincinnati & Richmond R. Co. et al, vs Wm. H. Campbell, error to the Circuit Court of Butler County. BY THE COURT.

The damages, for which a recovery is given by section 3283, Revised Statutes, are personal in character and do not pass to a grantee on a conveyance of the land. Judgment affirmed.

2768—John W. Daniels et al, vs Henry

Steube, admr, error to the Circuit Court of Miami County. Judgment affirmed.

2784—H. G. Bright vs Elliott M. Miller et al, error to the Circuit Court of Darke County. Judgment affirmed.

2812—The City of Cincinnati vs Lewis Seasongood, error to the Circuit Court of Hamilton County. Affirmed on the authority of Lewis Seasongood vs the City of Cincinnati, 5 O. C. C. Rep. 225.

2814—Joseph T. Harrison vs The Buckeye Building & Loan Association, error to the Circuit Court of Hamilton County. Judgment affirmed.

2944—Eliza C. Hunt et al, vs Rachel Hunt et al, error to the Circuit Court of Belmont County. Suggestion of death of Wm H. Hunt and revivor in the name of C. J. Howard, admr.

3687—The Commissioners of Ashland County vs Milton Winbigler, Clerk &c, error to the Circuit Court of Ashland Co. Dismissed by consent.

3739—Carkin, Stickney & Cram vs August Johnson, error to the Circuit Court of Ashtabula County. Judgment affirmed. Spear J., dissents.

3788—Chas A. Hinsch vs The City of Cincinnati et al, error to the Circuit Court of Hamilton County. Judgment affirmed.

3817—John Keck et al vs The City of Cincinnati et al, error to the Superior Court of Cincinnati. Judgment affirmed.

The following causes on the General Docket are dismissed for failure to file printed record.

3917—John Harding vs The State of Ohio ex rel, Maxima E. Emley. Error to the Circuit Court of Warren County.

3918—John A. Reece vs The State of Ohio ex rel, Wm W. Whiting. Error to the Circuit Court of Warren County.

3924—Dora M. Morse vs Ezra J. Potter. Error to the Circuit Court of Cuyahoga County.

Motion Docket.

2140—The State of Ohio ex rel. E. W. Poe et al vs Chas H. Jones, Auditor of Lucas County, mandamus, cause No. 3951 on the general docket. Demurrer to answer sustained. Peremptory writ allowed. To be reported.

2158—The Gill Car Manufacturing Co. vs Edward G. Roberts et al. Motion by

plaintiff for leave to file bill of exceptions in cause No. 2818, on the general docket. Motion allowed.

2159—The N. Y. Chicago & St. L. R. R. Co. vs John C. Koechley. Motion by defendant to advance cause No. 3976, on the general docket. Motion allowed.

2160—The Lake Shore Ry Co. vs Kate L. Foil, admx. Motion by defendant to advance cause No. 3934, on the general docket. Motion allowed.

2161—The Cincinnati Inclined Plane Ry Co. vs the City of Cincinnati. Motion by plaintiff for stay of execution in cause No. 3872, on the general docket. Motion allowed.

2162—Michael Muller vs Edward H. Weisenborn et al. Motion by plaintiff to reinstate cause No. 3912, on the general docket. Motion allowed by agreement of parties.

2163—Geo. W. Havens, assignee et al. vs Thomas Harton, Jr. Motion by plaintiff to advance cause No. 3990, on the general docket. Motion overruled.

2164—The State of Ohio vs the Board of Commissioner of Stark County et al. Motion by plaintiff for injunction in cause No. 4009, on the general docket. Motion allowed.

Cases up to and including No. 2960, on the General Docket are called and submitted. The next call will be up to and including No. 3075.

TUESDAY, MAY 8, 1894.

2205. Julia A. Homer v Morris D. McCandless et al. Error to the Circuit court of Mahoning county. Judgment affirmed.

2762. The Ohio Valley National Bank of Cincinnati v. David N. Murry et al. Error to the Circuit court of Scioto county. Judgment affirmed.

2793. Joseph L. Rawson v. Harriet H. White, ex'rs. et al. Error to the Circuit court of Sandusky county. Judgment affirmed.

2796. Wilson T. Clements v. Moses McCure. Error to the Circuit court of Allen county. Judgment affirmed.

2829. Philip Reimer et al, partners v. Gilbert C. Hoover et al. Error to the Cir-

cuit court of Tuscarawas county. Judgment affirmed.

2838. Enos Moreland, Guard. &c. v. Samuel Mookhead et al, Ex'rs. Error to the Circuit court of Holmes county. Judgment affirmed.

2839. Stiles C. Smith et al, Partners, v. Gilbert C. Hoover et al. Error to the Circuit court of Tuscarawas county. Judgment affirmed.

2845. James S. Kirk & Co. v. The Ohio Valley Insurance Co. Error to the Circuit court of Hamilton county. Judgment affirmed.

3135. Julia A. Homer v. Bales M. Campbell, Adm'r. Error to the Circuit court of Mahoning county. Judgment affirmed.

3212. Robert Slain v. The P. C. & St. L. R. R. Co. et al. Error to the Circuit court of Montgomery county. Judgment affirmed.

3820. Isabella G. Reilly et al. v. The City of Cincinnati et al. Error to the Circuit court of Hamilton county. Judgment affirmed.

3869. Patrick Moran v. The State of Ohio. Error to the Circuit court of Cuyahoga county. Judgment affirmed.

The following causes on the General Docket have been dismissed for want of preparation.

2850. Hezekiah Cole, Ex'r. v. Emery G. Hardy et al. Error to the Circuit court of Lake county.

2853. Henry O. Bonnell et al, v. Frank White et al. Error to the Circuit court of Mahoning county.

2860. Neely Norris v. Alfred P. Rogers et al. Error to the Circuit court of Tuscarawas county.

2867. Simeon M. Johnson Adm'r &c. v. Estella Speigel. Error to the Circuit court of Hamilton county.

2875. C. A. Selzer v. J. M. Chandler et al. Error to the Circuit court of Cuyahoga county.

2878. The Trustees of The Cincinnati Southern Ry. v. David Banning et al. Error to the Circuit court of Hamilton county.

2887. Mary C. Crumrine v. The State of Ohio ex rel. F. M. Fudge. Error to the Circuit court of Preble county.

2890. Nicholas Conrad v. Peter Good.

Error to the Circuit court of Fairfield county.

2892. David B. Hull et al v. Charles H. Horton. Error to the Circuit court of Lorain county.

2896. First National Bank of Warren v. W. L. Scott et al. Error to the Circuit court of Trumbull county.

2901. The North Western Ohio Nat'l Gas Co. v. John Zarbaugh et al. Error to the Circuit court of Hancock county.

2908. The Valley Railway Co. v. Apolina Orth. Error to the Circuit court of Summit county.

2915. Dorothy Bunch v. The Village of Uricksville. Error to the Circuit court of Tuscarawas county.

2916. L. Mozart Chaffee v. Elizabeth Foster. Error to the Circuit court of Summit county.

2922. The C. & M. Ry Co. v. Wm. S. Black. Error to the Circuit court of Pickaway county.

2923. The Cleveland, Lorain & Wheeling R. R. Co. v. Francis McCord et al. Error to the Circuit court of Belmont county.

2927. The Mt. Adams & Eden Park Inclined Ry. v. David Peppard. Error to the Circuit court of Hamilton county.

2937. The Board of Commissioners of the Gladly & Weberton Turnpike v. The Commissioners of Clinton county. Error to the Circuit court of Clinton county.

2939. The Lafayette Car Works v. Robt Webb. Error to the Circuit court of Allen county.

2940. Alexander McGinnis Adm'r &c. v. Charles M. Miller et al. Error to the Circuit court of Auglaize county.

2943. The commissioners of Lorain county v. The L. S. & M. S. Ry Co. Error to the Circuit court of Lorain county.

2950. George P. Roberts v. Caleb E. Tillinghast. Error to the Circuit court of Erie county.

MOTION DOCKET.

2151. The State of Ohio ex rel. John McNeal et al, comm's v. E. W. Poe, Auditor et al. Mandamus. Cause No. 3440 on the General Docket. Demurrer to answer overruled, and judgment for defendant.

2165. R. Y. Warner v. Wm. L. Gares. Motion by plaintiff for stay of execution and supersedas in cause No. 4010, on the General Docket. Motion overruled.

2166. John Matthews v. Matthew Hanna. Motion by plaintiff to re-instate cause

No 2764, on the General Docket. Motion overruled.

2167. The State of Ohio v. Samuel L. Nelson. Motion for leave to file bill of exception to the Common Pleas Court of Clark county. Motion allowed.

SUPREME COURT NEWS.

COLUMBUS, O., May 7.—The following cases were filed in the Supreme Court last week:

4013—The Lake Shore and Michigan Southern Ry Co. vs the State of Ohio on complaint of Geo L. Lawrence. Error to the Circuit Court of Cuyahoga county. Estep, Dickey, Carr & Goff, Cleveland, for plaintiff; W. H. Polhamus, Cleveland, for defendant.

4014—August Leow vs Wm H. Fry. Error to the Circuit Court of Ottawa county. Buckland & Love, Fremont, for plaintiff; C. I. York, Port Clinton, for defendant.

4015—Abram Flory and Jesse A. Flory vs Frederick Vogelmier. Error to the Circuit Court of Licking county. J. A. Flory, Newark, for plaintiff; J. B. Jones, Newark, for defendant.

4016—The Jones Bros. Electric Co. vs the Elektron Manufacturing Co., of New York. Error to the Circuit Court of Hamilton county. Pogue, Pottenger & Pogue, Cincinnati, for plaintiff, and A. M. Warner for defendant.

4017—The Chicago & Ohio Coal and Car Co. vs the New Pittsburg Coal Co. Error to the Circuit Court of Athens county. Monk & Elliott and J. M. Jewett, Athens, for plaintiff, and Grosvenor, Jones & Davis, Athens, for defendant.

4018—Chas Crawford, et al., vs Ohio, ex rel. James Devore, et al. Error to the Circuit Court of Brown county. John M. Markley, Georgetown, for plaintiffs; Young & Barnes, Georgetown, for defendants.

4019—The State of Ohio vs Samuel L. Nelson. Motion for leave to file bill of exceptions to the Common Pleas Court of Clarke county. Chase Stewart, Springfield, for plaintiff; Judge Miller for defendant.

4020—Mary Palmer, executor, vs William A. Palmer, et al. Error to the Circuit Court of Muskingum county. C. M. Vandembark, Zanesville, for plaintiff; J. W. King, Eaton, for defendants.

4021—James T. Black, Receiver of the Plain City Bank, vs James W. Robinson, administrator of Alvah Smith, deceased, Lawson Calhoun, Jas B. Smith, Emery Smith, administrator of Chas B. Smith, deceased. Error to the Circuit Court of Union county. Selwyn N. Owen, Columbus, for plaintiff; R. A. Harrison and Powell, Ricketts & Black, Columbus, for defendants.

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SATURDAY, MAY 10, 1904.

CIRCUIT COURT DECISIONS.

We publish, in this issue, such decisions from Wood County Circuit as have been revised and approved by the Court. Judges have been unusually busy at Norwalk this week. Appreciating the importance of having absolutely correct reports our subscribers will, we trust, tolerate such delay as is usually incidental to a new departure. After a little the decisions from each county will be revised and published promptly.

MECHANICS AND VENDORS LIENS.

There is, among Common Pleas decisions published in this number, an interesting and important decision by Judge Pagsley of the Lucas County bench. It involves a construction of Section 3184 R. S., relative to Mechanics Liens and decides questions which have not been passed upon by the Supreme or Circuit Courts.

CORNER LOT LITIGATION.

Several phases of the corner lot litigation were considered and determined by Judge Harmon on Saturday last. In two cases, his decision was in favor of the property owners as will appear in the cases reported.

A third case, that of Douglas vs Toledo (No. 35089) was continued to give plaintiff an opportunity to introduce testi-

mony. The case involves property at the corner of Floyd and Warren streets and the action was brought to enjoin the collection of an assessment for paying Warren street. The lot, as platted, fronts on Floyd street and Counsel for plaintiff urged that the house was constructed, in its whole arrangement, to front on Floyd street although the entrance to the property is on Warren street and it has no entrance from Floyd street.

Judge Harmon was of the opinion that the interior arrangement of the house had little to do with determining the question at issue; that from the facts stated, and under the principle laid down in the Haviland case, the actual frontage of the lot, as used and occupied, is on Warren street.

He would have so held but Counsel for plaintiff desired to introduce further testimony and the case was passed for that purpose.

DIVORCE LAW IN ITALY.

The following are grounds for which divorces are said to have been granted by the Italian Courts: For calling his wife's sister a thief; for beating his wife's pet dog; for constantly chewing tobacco; for cutting his wife's curls without her consent; for refusing to take his wife out for a walk; for refusing to sew on her husband's trousers buttons; for forcing his wife to sit up until after midnight; for the wife staying in bed until noon; for refusing to let her husband go too near the kitchen fire on a cold day; for dragging her husband out of bed by the beard; for the wife strolling around town and shopping instead of attending to her domestic duties.—Wayne Co. Legal News.

A CHINAMAN ON A CHICAGO TRIAL.

During the World's Fair a Chinaman

of some note visited one of our courts of record while a trial was in progress and in writing back to a friend in describing the trial he said: "One man is silent, another talks all the time, and twelve wise men condemn the man who has not said a word."—Chicago Legal News.

MOB LAW.

Logan County Grand Jurors, at their present session, have to deal with unusual offenders or at least pass judgment on their acts. The facts, together with the views of Judge Price on the subject of lynching appears in his charge to the Grand Jury, which we give in full:

Gentlemen of the Grand Jury:

I have been on the bench continuously a little more than twelve years. During that time I have had many unpleasant duties, and doubtless have made mistakes, but I have never knowingly refrained from doing what I conceived to be my official duty. I am again confronted with an unpleasant duty, but shall endeavor to meet it as becomes my position. On the 15th day of April last, at the village of Rushsylvania, in this county, one Seymour Newlin was hanged by a lawless mob. This action of the mob was in violation and disregard of law. It demands searching investigation on the part of the Grand Jury. That the victim may have deserved his fate is wholly beside the question. The Constitution of the State provides that "the right of trial by jury shall be inviolate." Whatever the charge may be against any person, he is entitled to a fair trial by an impartial jury. Whether Newlin was guilty or not guilty, the mob had no authority, either in law or morals, to pass on the question of his guilt or innocence. If it be said that the law provides no adequate punishment for the crime with which he was charged, the answer is, that an appeal should be made to the law-making power of the State to remedy the supposed defect. If it be admitted that

an unauthorized body of men may remedy supposed defects in legislation, then there is an end of organized civil society, and we are plunged into a state of anarchy. If it be true that Newlin was guilty of the crime charged against him, it gives us no excuse for the persons engaged in his taking off. That his hanging may have been participated in by persons who ordinarily are good citizens in no wise relieves the act of its criminal character. If so-called good citizens may take the law into their own hands today for the purpose of removing a bad character, then another class of citizens may tomorrow resort to the same remedy, for the purpose, it may be, of disposing of a good citizen. Mob law is a relic and an evidence of barbarism. That we have had a hanging by a mob is a stain upon the fair name of Logan county, and the great State of Ohio. Ohio, with its large population, its great material wealth, and with intelligence so generally diffused among the people, is an empire in itself. She has grown great under a reign of law and order. If she is to maintain her greatness it must be by securing every citizen, even the humblest, in his constitutional rights and privileges. If mob law is not checked in this country, our children will live to see the day when they are burdened with taxation to maintain a large standing army. The persons who actively participated in the hanging of Seymour Newlin are guilty of the crime of murder. The persons who encouraged, aided or abetted his hanging are also guilty of murder. This is plain speaking, but the occasion demands it. While I desire to speak temperately, I also desire to use language about which there can be no misunderstanding. The Grand Jury should send for witnesses, make a thorough investigation, and ascertain, if possible, who were engaged in the hanging of Seymour Newlin. When they ascertain who were so engaged, they should without fear or favor, indict them. If the proper persons should be indicted, and convicted upon a fair trial, and punished for their crime, it would be the best blow that has been struck in behalf of good government in many a day.

U. S. District Court.

Grand Jurors for June term of the U. S. District Court, Northern District, D. W. Vail, Norwalk; Lyman Hilton, Brunersburg; P. I. Lenhart, Wauson; Martin Struble, Bryan; John S. Davis, Monroeville; C. M. Keith, Toledo; Geo Daum, Napoleon; D. J. Cain, Toledo; E. A. Frinfrock, Prospect; John C. Compland, Paulding; Peter Brady, Bellevue. Geo W. Clary, Birmingham; Byron Gager, Sandusky; W. Clark, Clay Center. E. B. Walkop, Delphos; Wm Lang, Toledo; Wm Zimmerman, Sandusky; W. Burns, Woodville; Peter Garlow, Bryan; Saml R. Vertner, Beaver Dam; Clark W. McDonald, Weston; Joshua Davis, Sandusky; Henry George, Antwerp; and Robt Max, Delphos.

U. S. Circuit Court.

1222—J. J. MacDonald et al vs T. S. Gilliland. Motion to require plffs to make petition more definite and certain. H. C. Glenn and H. G. Richie, attys.

1058—Daniel M. Kennedy vs The Solar Refining Co. Deposition of Charles F. Chandler, filed by respondent.

1218—Frederick Leavens et al vs Chas E. Bronson et al. Entry of appearance of The Merchants & Farmers Bank of Hicksville Ohio; The Dime Savings Bank of Thompson Conn; The Thompson Nat'l Bank of Thompson Conn; Geo H. Nicholas; Mary E. Wand; The First Nat'l Bank of Fremont Ohio; The First Nat'l Bank of Defiance Ohio. Harris & Cameron, Solicitors.

1218—Same vs Same. Precipe for subpoena for Sarah A. Breiner, Guardian, filed. Parks & Parks, Solicitors.

1229—Franziska Gawlack admx vs The Mich Cent Ry Co. Motion to remand filed. Geo. B. Boone, atty

1182—The Farmer's Loan & Trust Co et al vs The T A A & N M Ry Co et al, motion for security for costs. Alex L. Smith Recrs solr.

1182—Same vs Same, answer of Recr to intervening petition of Ida B. Beaulieu

admr of the est of Silvio H. Beaulieu. Alex L. Smith solr for recr.

1182—The Farmers L & T Co. vs The T A A & N M Ry Co., order permitting David D. Whitesell to fill intervening petition.

1182—Same vs Same, intervening petition of David D Whitesell. C. S. Ashlev. solr

1229—Franziska Gawlack vs Michigan Central R R Co. Transcript of proceedings in Common Pleas Court.

Common Pleas Courts

OF OHIO.

The following are among the important and interesting decisions of a recent date.

MECHANICS LIENS. CONSTRUCTION
OF SEC. 384 R. S. VENDORS
LIEN. SUBROGATION.

(Court of Common Pleas of Lucas County—April Term 1894.)

The case of *Wm. A. Gashe, assignee, vs Ohio Lumber & Manufacturing Co., and others*, which was heard by the Court on appeal from the Probate Court, involved the validity and priority of certain liens upon the property of the Lumber Co. The property had been sold by order of the Probate Court and the proceeds of sale were in the hands of the assignee for distribution. The testimony showed the following facts:

On Feb. 4th 1893, the Lumber Co. bought by contract of John R. V. Ransom seven lots for \$3,500 of which the sum of \$700 was paid in cash. The company took possession and at once began to improve the lots by erecting thereon a factory building and its appurtenances to be used in the manufacture of doors, sash, blinds and other articles pertaining to the operation of a planing-mill, and also for carrying on a general lumber business. On May 27, 1893, Ransom deed the lots to Bertram L. Paine, an officer of the Lumber Co., and Paine gave a mortgage on the

lots to the Mutual Aid Building & Loan Co. to secure a loan of \$5000 and on the same day Faine conveyed the lots to the Lumber Co. subject to the mortgage, which the company assumed and agreed to pay. The two deeds and mortgage were all given as parts of one transaction. The \$5000 loaned by the Loan Co. were paid over to the Lumber Co. and out of this sum the Lumber Co. paid to Ransom the balance due on the purchase price of the lots, amounting to about \$2,600.

Under contracts made with the Lumber Co. prior to May 27th, Arbuckle, Ryan & Co., The Shaw, Kendall & Co. and Henry P. Tobey furnished materials and machinery for use in said building and while it was in process of construction, and with the exception of a few minor items all of said materials and machinery were furnished and put into said building before May 27th. Mechanics liens for the same were duly filed and recorded. Arbuckle, Ryan & Co. furnished the engine, boiler and the usual fittings and connections. The Shaw, Kendall & Co. furnished certain shafting and belting, an engine with fan and heater to be used for drying lumber and also a Sturtevant Exhaust Fan to be used for gathering shavings from the machine shop. Tobey furnished certain belting to be used for transmitting power from the shafting to the various wood-working machines. These various items of materials and machinery were attached to the building and its appurtenances in the manner which is usual in the preparation of a building for manufacturing purposes. Arbuckle, Ryan & Co. furnished and put up the engine and boiler under a contract dated Feb'y 16th without any reservation of the title to the property. On May 27th, at the time the mortgage was given, in consideration of the loan made by the Loan Co., they signed at the

request and for the benefit of the Loan Co. a "waiver of lien" as follows "we hereby waive our right to any mechanics or material man's lien upon said property in favor of said company so far as said real estate is concerned. It being understood and agreed that the machinery is not to become a part of the realty until paid for."

From the judgment of the Probate Court fixing the amounts and priorities of the liens, an appeal was taken to this Court by the Loan Co. Since the cause was appealed an order has been entered directing the payment of the claims of the defendants The Toledo Supply Co. and The Toledo Brick Co. out of the proceeds of the sale of the property and dismissing the action as to said defendants without prejudice to the rights of the other parties to the cause. This order was consented to by all parties. The defendant, Tobey, now moves to dismiss the appeal because of this order and on the ground that the Court has lost jurisdiction of the case. The defendant, the Loan Co., contends, *first*, that the alleged mechanics liens of the Shaw, Kendall & Co. and Tobey are invalid for the reason that the materials and machinery furnished were not of such a character nor so attached to the factory as to be entitled to a lien upon the realty and *second*, if said liens are valid that the Loan Co. has a prior lien to the extent of the \$2,600 paid by the Lumber Co to Ransom for the balance of the purchase price of the lots or that at most the said liens only attached to the interest which the Lumber Co. had in the property before the balance of the purchase price was paid.

THE COURT HELD, BY PUGSLEY, J.

1. The whole case was appealed to this Court. The notice of appeal by the

Loan Co. was general and the appeal bond was given to all the other parties to the cause. This Court having jurisdiction of the whole case and of all the parties right-fully dismissed the action as to the two defendants whose claims were paid and who thereby ceased to have any interest in the controversy. The order of dismissal did not deprive this Court of jurisdiction to proceed and determine the remaining issues in the case. *Means vs Clark*, 7 C. C. 276, distinguished.

2. The question as to the validity of the alleged mechanics liens depends upon the proper construction of sec 3184 R. S. and is solely between the owner and the mechanics lien claimant. If he has a lien as against the owner, other lien holders cannot dispute it.

Sec 3184 R. S., is as follows: "A person who performs labor or furnishes machinery or materials * * for erecting * * a house, mill, manufactory or other building, appurtenance fixture or other structure * * by virtue of a contract with the owner, shall have a lien to secure payment of the same upon such house, mill, manufactory or other building or appurtenance, fixture or other structure * * and upon the material or machinery so furnished and upon the interest, leasehold or otherwise of the owner in the lot or land upon which the same may stand." The question to be determined is whether the labor was performed, and the machinery and materials were furnished by the claimants, "for erecting a manufactory" within the meaning of this section. Very little aid can be derived from a consideration of the decisions of other states in construing their own mechanics lien laws, as the provisions of the mechanics lien laws of the various states are so widely different. Giving to the language of the statute its ordinary and natural import, a

manufactory is a building designed and equipped for manufacturing purposes and whatever is attached to a building to fit it for manufacturing purposes is furnished "for erecting a manufactory." The machinery and materials in this case were furnished during the construction of the factory. They were essential to the purposes for which the building was designed and were in some manner attached to the building. They were used in erecting the manufactory and formed a part of it. The case comes within the terms of the statute. This view is supported by the construction given to this section in *Hart vs Globe Iron Works*, 37 O. S. 75 and *Beckel vs Pellicrew*, 6 O. S. 247. The rule as to what passes by a mortgage or conveyance of land is not decisive of the question here, but applying that rule, a greater part of the machinery furnished would be regarded as a part of the realty, because it supplied or contributed to supply the motive power by which the machines in the factory were propelled. It is generally held that the machinery of a manufactory which supplies the motive power, such as the engine and boiler and their usual attachments, is a fixture and passes by a conveyance or mortgage of the land, while the machinery which is propelled by the motive power is personalty and does not pass by such mortgage or conveyance. *Case Mfg Co vs Garven* 45 O. S. 289. But even as between vendor and vendee or mortgagor and mortgagee it is held that the conveyance of a mill or manufacturing establishment, as such by any general name or terms of description commonly understood to embrace all its essential parts, passes the machinery belonging to such mill or establishment, whether affixed to the freehold or not. *Teaff vs Hewitt*, 1 O. S. 511. The

mechanics liens are valid and prior to the lien of the Loan Co's. mortgage.

3. The Loan Co. is not subrogated to a vendors lien by reason of the payment of the \$2,600 to Ransom out of the money loaned to the Lumber Co. In Ohio a vendors lien is not assignable, *Brush vs Kinsey*, 14 Ohio 21, and where the lien is not assignable, there can be no subrogation to the position of the vendor by implication of law, 2 *Jones on Liens* Sec. 1093, 3 *Pomeroy's Equity* Sec. 1254. Even if the money was loaned for the purpose of being used in part to pay for the lots, the Loan Co. cannot claim a vendors lien for the part so used. In the case of *Slansell vs Roberts*, 13 Ohio 149, money was borrowed to pay for land and a mortgage was given on the land to the lender to secure repayment of the money borrowed, but the mortgage was not recorded until after the record of a mortgage subsequently given. It was held that a third person advancing money to enable a purchaser to buy land cannot claim a vendors lien and that the second mortgagee had the first lien, although he knew of the first mortgage. The Loan Co took from the Lumber Co. a mortgage for the whole sum loaned and evidently relied upon the mortgage alone for security.

The liens of the mechanics are subject only to prior liens and the entire interest of the owner may be subjected as against subsequent liens, and not alone the interest which the Lumber Co. had in the property before the balance of the purchase price was paid to Ransom. The case is distinguishable from *Neil vs Kinney*, 11 O. S. 58. In that case a person holding the legal title to a lot sold it by contract and received notes for the purchase price. The purchaser erected a building upon the lot and mechanics

liens therefor were duly perfected. Subsequently a deed was given to the purchaser and a mortgage was taken back to secure the notes, which mortgage was assigned to the real owner of the lot. It was held that the assignee of the mortgage being the owner in equity of the lot and of the purchase money, had a vendor's lien, which was prior to the liens of the mechanics. The case would be in point, if Ransom had taken a mortgage for the balance of the purchase price after the inception of the mechanics liens, and he was seeking to enforce a vendor's lien. But the Loan Co. did not own the lots and was not entitled to any of the purchase price and as already held, it had no vendor's lien. The first and only lien which it acquired was under its mortgage and this lien is subsequent to the mechanics liens.

The decree of the Court was that out of the proceeds of the sale of the property exclusive of the engine and boiler there be first paid the claims of The Shaw Kendall & Co. and Henry P. Tobey and that the balance of the said proceeds be paid to the Loan Co. and that the proceeds of the sale of the engine and boiler be paid to Arbuckle, Ryan & Co.

O. S. Bramback for the Loan Co.

King & Tracy, Harris & Thurston and I. N. Huntsberger for the mechanics lien claimants.

MISJOINDER OF CAUSES.

Zeigler vs Ashley, A. Bentley and City of Toledo. Action for damages for personal injuries.
LEMMON, J.

Plaintiff alleged in his petition that defendants Bentley and Ashley were, on the 19th of October, 1892, constructing a large building on the corner of Jefferson and Michigan streets; (The Monticello)

that in the construction of said building, and prior to said date, said defendants had caused an excavation to be dug extending into said Jefferson street; that while it was the duty of said defendants to guard said excavation they were negligent in this regard and that plaintiff, while walking along said street on the night of said day, fell into said excavation and suffered the damages for which he seeks compensation.

The negligence charged against the city was that it knowingly permitted said excavation to be and remain without sufficient guards to protect the public.

The city, having obtained leave of the court to withdraw its answer and to file a special demurrer, demurred to said petition for the reason that separate causes of action against several defendants were improperly joined.

This demurrer was sustained by the court upon the ground that the city not having created the danger could not be liable in this cause without actual notice of the dangerous condition of said excavation or unless it had existed for such length of time prior to the accident as to charge it with constructive notice thereof; and on the ground that this constituted a separate cause of action against the city because the negligence of its co-defendants was in not sufficiently protecting the public against a danger they had created.

It was further claimed by counsel for the city that the action being joint the judgment, if rendered against defendants, must be joint and that if the city was required to pay the judgment there could not be that contribution or indemnity which the law gives a municipality in cases where it has been required to pay damages resulting from the negligence of third parties.

This claim was also sustained by the court.

James E. Pilliod and F. E. Wright for pff. Chas F. Watts and Julian H. Tyler for the city.

Swayne, Swayne, Hayes and Tyler, C. S. Ashley and Alex L. Smith for other defendants.

BARN ON REAR OF LOT

Built Fronting the House Fronting on Another Street, Does Not Make a Foot Frontage Though It Has an Entrance From Side Street.

(Lucas County Com Pleas—April Term 1894.)

34903—Daiber vs City. Property corner of Jefferson and 18th street. The lot was platted to front 100 ft on Jefferson St. and abutted 160 feet on 18th street. The house was built fronting on Jefferson street. A barn on the rear end of the lot had an entrance from 18th street.

HARMON, J.

Defendant urged that while a portion of the assessment for 160 feet on 18th street might be illegal it was valid for the number of feet occupied by the barn; that such occupancy of the rear of the lot made a front footage of so many feet on 18th street.

The court held, that the barn having been built actually fronting the house, which fronted on Jefferson street, the use of 18th street was merely incidental to an occupancy of the premises with reference to the frontage on Jefferson street.

C H. Lemmon, for plaintiff.

Horace Merrill, Assistant City Solicitor, for defendant.

ASSESSMENT BY FRONT FOOT.

Application of the Rule Laid Down in Haviland vs. Columbus.

(Lucas County Com Pleas—April Term 1894.)

35084—Bentley vs City of Toledo. Suit to enjoin the collection of an assessment for the improvement of 14th street by paving.

HARMON, J.

The lot in question abutts 110 feet on 14th street and 67 feet on Adams street.

It is occupied by two houses, both fronting on Adams street, and each house occupying a frontage of $33\frac{1}{2}$ feet on Adams street of the lot extending back 110 feet at a uniform width. The assessment was made by the front foot and for 110 feet on 14th street.

The Court held :

The principle of the rule of assessment as laid down by the Supreme Court in *Haviland vs the City of Columbus* is that an improvement on a certain street benefits the property on it in proportion to the frontage of each lot; applying that rule to this case only that part of the lot occupied by the house on the corner of Adams and 14th street is benefitted by the improvement and that part has a frontage of $33\frac{1}{2}$ feet, so that this lot can only be assessed for $33\frac{1}{2}$ feet front and not for 110 feet.

C. H. Lemmon and Geo. P. Kirby for plaintiff.

C. F. Watts and Horace Merrill, City Solicitors, for defendant.

STREET IMPROVEMENTS.

Fact That Land Was Dedicated After the Improvement Ordinance Was Passed No Defense to Assessment, the Benefit of Which Defendant Received

(Lucas County Com Pleas—April Term 1894.)

Toledo for use etc. vs Barnes—

Action to enjoin the collection of an assessment for grading.

HARMON, J.

Plaintiff's counsel contended that the property on which the street was located was, at the time the improvement ordinance was passed, private property and that therefore the street could not legally be lo-

cated there; an injustice to require plaintiff to pay the assessment.

The improvement was made according to plans, specifications and profiles, on file in the office of the City Civil Engineer, which clearly indicated where the improvement was to be made. After the ordinance was passed the property was dedicated and the street was graded. Defendants property was benefited and he stood by and allowed the improvement to go on without objection. The Court is unable to see the injustice of requiring defendant to pay his share of the expenses of the improvement, and the fact that the land, on which a portion of the street was located and constructed, was dedicated after the passage of the ordinance providing for the construction and grading of the street, constitutes no defence to the assessment.

Stephen Brophy for plaintiff,

I. N. Huntsberger for defendant.

ASSAULT

With Intent to Commit Rape. Incompetent and Immaterial Evidence Offered by Defendant.

(Lucas County Com Pleas—April Term 1894.)

Ryan vs Sayen—Action for damages for assault with intent to commit a rape.

HARMON, J.

Plaintiff, a woman, charges defendant with making an assault upon her with intent to commit a rape and defendant sought, in the trial by jury, to show his good reputation as a *peaceable and quiet citizen*. Objection to receiving the evidence sustained. Verdict for plaintiff.

ACTION FOR DAMAGES FOR PERSONAL INJURIES.

Duty of a Storekeeper to Secure His Customers Against Injury from Mischievous or Dangerous Human Beings.

(Court of Common Pleas—General Term.)

APRIL, 1891.

Present: Hon. Joseph F. Daly, C. J.; Henry Bischoff, J., and Roger A. Pryor, JJ.

Anna E. Swinarton, respondent, vs Geo. Le Boutillier, appellant.

The presence of a mischievous human being on premises may constitute the danger against which the law requires of the occupant reasonable care to protect his invitee.

A customer in a store is there by invitation of the merchant, who owes him the duty of reasonable care to secure him against injury, as well from the misconduct of the merchant's employees as from the dangerous condition of his premises; and for breach of duty, with consequent injury, the customer may maintain an action for negligence against the merchant.

In an action for personal injury the plaintiff had a verdict for \$10,000.

A motion on the minutes for a new trial being denied, judgment was rendered; and the appeal is from the judgment and the order denying a new trial.

While a customer in defendant's dry goods store, plaintiff's eye was put out by a pin snapped or shot by a cash boy.

Other facts appear in the opinion.

J. DeChanty for appellant.

Hatch & Wickes for respondent.

PRYOR, J.

The ground of an action for negligence is the breach of a duty owing by the defendant to the plaintiff. To sustain such

action it is incumbent on the plaintiff to show the duty and to show its breach, with a consequent injury to himself.

In the present case, that the plaintiff has suffered injury from the fact of which she complains, and that the damages awarded are not an excessive reparation for the wrong, if such there be, are not the subject of controversy. The contention is over the two other elements of actionable negligence; namely, the duty and its breach.

These essential facts a plaintiff must establish, not by a scintilla of evidence merely, but by proof reasonably sufficient to uphold a verdict in his favor.

Upon a critical review of the evidence, our conviction is that it suffices to support the facts from which plaintiff deduces the duty and the breach; and hence the question for adjudication is: Do those facts show a case of actionable negligence? In other words, can it be affirmed of the facts, as a legal conclusion, that they involve a violation of duty to the plaintiff?

It is conceded that at the time of her injury the plaintiff was on the defendant's premises by his invitation and for his advantage, and that she suffered the hurt by effect of a mischievous agency operating on those premises, of which she was without notice. But this is not enough. To complete a case of actionable negligence on the theory under consideration, the plaintiff must go farther and show the defendant responsible for the harmful agency by proof that it exists in consequence of his want of care. Imposing authority might be adduced for the proposition that the duty of defendant was more absolute—that is, not to permit the hurtful agency on his premises (*Beck vs Carter*, 68 N. Y., 283, 292, and citations); but we prefer to limit his liability to the absence of proper

diligence in the protection of the plaintiff (Coughtry vs The Globe, & etc., 56 N. Y., 124; Bennett vs R. R. Co. 102 U. S., 577).

It being settled law that an occupant of land is bound to use ordinary care and diligence to keep the premises in a safe condition for the presence of persons who come thereon by his invitation, express or implied, or for any other purpose beneficial to him (2 S. & R. on Neg., sec. 704); the questions presented by the facts as found are: first, were the premises in an unsafe condition, in the legal sense; and second, if so, was that condition the effect of defendant's want of care and diligence?

Had plaintiff sustained the injury from a defect in the premises, or in machinery upon them, assuming negligence in keeping them, the liability of the defendant would be beyond dispute. But here the injury was inflicted by the act of a boy with a propensity to mischief, in the employ of defendant and by him placed on the premises, in a position to do the injury. Why does not such boy, so employed and placed, constitute a danger upon the premises as effectual for evil as a trap door, or pitfall, or a dilapidated stairway? That the cause of the injury need not be an inanimate agency is shown by the decision in *Loomis vs Ferry* (17 Wend., 197), where *held*, that even a trespasser may maintain an action for the bite of a ferocious dog left at large on the defendant's lot (*Carroll vs R. R. Co.*, 58 N. Y., 126, 136).

In *Mallach vs Ridley* (24 Abb. N. C., 172, 181) it is said that "the storekeeper invites the public to enter his premises and to subject themselves to the custody and control of his subordinates, and by parity of reasoning" (with that prevailing in common carrier cases) "he should be held

responsible for the brutalities of such subordinates, even when they are not committed in the strict line of their employment."

In *Dean vs St. Paul Union Depot Co.* (37 Am. & Eng. RR. Cas., 360) the Court said that "the defendant was bound to use ordinary care and diligence to keep its premises in a safe condition for those who legitimately came there. It had no more right, therefore, to knowingly and advisedly employ, or allow to be employed in its depot building a dangerous or vicious man than it would have to harbor a ferocious or savage dog or to permit a pitfall or trap into which a passenger might step as he was passing to or from his train."

The case at bar may be new in the instance, but not in the principle; and in the absence of authority to the contrary, upon the analogies of the law and the dictates of common sense, we adjudge that the presence of the boy on the premises, with the propensity to evil-doing, was a danger against which it was the duty of the defendant, by the exercise of proper care, to protect the plaintiff.

We hold, furthermore, that having invited the plaintiff into his store for his benefit, and having authorized and induced her to confide in the good conduct of his servants, to whom in the transaction of his business he committed her, he thereby assumed the duty, by the exercise of reasonable care, of protecting her from injury by the misconduct of such servants; and that he is answerable to her for any injury she has sustained by such misconduct, which, in the exercise of reasonable care, he might have prevented.

The verdict involves the fact of his failure in the exercise of the duty so incumbent upon him (*Sutter vs Vanderveer*, 122

N. Y., 652, 651), and we are to inquire whether the evidence suffices to justify the finding of the jury.

The proof is ample to authorize those inferences; that the defendant kept in his store a number of "cash boys" for attendance on customers; that among these boys the propensity and habit of "snapping pins" at objects and persons in the store was prevalent; that this snapping or shooting pins by these boys was likely to inflict injury on defendant's customers, and did, in fact, inflict the injury of which the plaintiff complains; that this habit of snapping or shooting pins by these boys had existed for months, and was known or ought to have been known by the defendant; that no reasonably sufficient precaution was taken by him to suppress the dangerous practice; and that he had not exercised a reasonable degree of care and diligence to secure the plaintiff against injury from such dangerous practice.

Such being the duty of the defendant and its breach to the injury of the plaintiff, and no contributory negligence being imputed to her, the right on her part to reparation in damages for the wrong, is clear and incontestable.

We are further of the opinion that plaintiff's cause of action is so supported by the proof, that the Court is not at liberty to set aside the verdict as against the weight of evidence (Nelson vs R. R. Co., herewith decided). Hence, the judgment must be affirmed: unless the exception to the refusal to dismiss the complaint be valid, or there be prejudicial error in the charge, or in the admission or exclusion of evidence.

On the conclusion of the plaintiff's case, and again at the close of all the evidence, the defendant moved to dismiss the complaint on the ground that the cause of ac-

tion pleaded was unproved. But it is obvious, on inspection of the complaint, that it proceeds as well upon the duty of the defendant to protect the plaintiff from danger on his premises, as upon his duty to secure her against injury by his servants in the course of their employment. The Court, also, put the case to the jury on the same theory. To the charge itself no exception was taken; and, indeed, it was unexceptionable.

Three requests called upon the Court to charge that there was not evidence to support specific propositions of fact. On a motion to nonsuit or dismiss, it is undoubtedly the duty of the Court to determine what the evidence is; but submitting the case to the jury, it is a question whether the Court may rightly instruct them that there is no proof of a particular fact. - That matter being already decided by the Judge, the deliberations of the jury are conducted on the assumption of some evidence of every essential fact; and their function is only to determine the sufficiency of the evidence. However this may be, there was adequate evidence of the facts suggested by appellant; and so, his requests were properly denied.

The other requests proceed on the supposition that no recovery could be had unless the injury to plaintiff was caused by a servant in the line of his employment; whereas, it is already apparent in this opinion that his liability stands well upon another and different principle of law.

The vicious habit of the boys was admissible in evidence, both as a substantive fact in the cause and as affecting defendant's knowledge of the danger incurred by plaintiff on his premises.

A statement of a witness to a third party not of the *res gestae*, and not tending to

impeach his testimony in chief, is clearly incompetent even on cross-examination. If, however, there was error in the exclusion, it was harmless, because of the introduction of the statement at a subsequent stage of the trial.

Similarly, the error, if any, in allowing the question to plaintiff's superintendent was innocuous, because the answer was in favor of the defendant. Besides, no ground of objection was specified.

Evidence by the plaintiff explanatory of her procrastination in bringing suit we are not at liberty to condemn as immaterial, since in his brief before us appellant carefully inserts the statement that "this action was commenced three days before the day on which it would have been outlawed." If the fact of the delay be deemed of effect upon us, it could hardly have been without influence with the jury.

In the absence of error in the record we affirm the judgment.

Judgment and order affirmed with costs.

DALY C. J., and BISCHOFF, J., concur.
--N. Y. Law Journal.

POINTS IN PERSONAL INJURY CASES.

Court of Common Pleas—General Term.

NEW YORK, April, 1894.

Present: Hons. Henry W. Bookstaver, P. J.; Henry Bischoff, Jr., and Roger A. Pryor, J. J.

John Doherty, respondent vs Samuel Loril, Jr., et al, appellants.

Rejection of a juror, in the exercise of discretion, because of a general prejudice against plaintiffs in actions to recover damages for personal injuries, sustained.

An averment in a complaint that defendants were the owners of a truck and two horses, which were in the possession of and being driven by defendant's ser-

vants. *Held*, Sufficient, without special allegation that they were being driven in the course of the servant's employment.

Under an averment that plaintiff was prevented for one month from attending to his business without pleading special damage, evidence is admissible showing nature of employment and value of earnings.

Under a general allegation of damages, the plaintiff is entitled to recover for such pain and suffering as he is reasonably certain to endure in the future.

Evidence that the truck bore defendant's name, *Held*, *prima facie* proof of ownership, and that the driver in charge of it was their servant.

Admission of evidence sustained tending to impeach the credibility of a witness by showing that he made statements out of Court conflicting with his testimony on the trial.

If a charge on the whole presented the questions fully and fairly, so that the jury were not misled, an exception to a part which, standing alone, may be open to adverse criticism, will not be available for the assignment of error.—N. Y. Law Journal.

RES JUDICATA.

In *Johnson Steel Street-Rail Co. vs William Wharton, J., Co., Limited*, decided in the Supreme Court of the United States in March, 1894 (14 Supt. Ct. R., 608), it was held that the application of the doctrine of *res judicata* is in no wise affected by the fact that the amount in controversy in the former suit was so small as to prevent the defeated party from securing a review of the judgment by an appellate Court.

The Court, after citing previous *decis*

ions in the Federal Courts, proceeded as follows: "In all of these cases, it will be observed, the question considered was as to the effect to be given by the Court of original jurisdiction to the judgment in a previous case between the same parties or their representatives, and involving the same matter brought up in a subsequent suit. In no one of them is there a suggestion that the determination of that question by the Court to which it was presented should be controlled by the inquiry whether the judgment in the first action could be reviewed upon appeal or writ of error.

"The counsel for the plaintiff in error, in support of his position, referred to the clause of the Constitution declaring that the judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish, and to the clause providing that the judicial power of the United States shall extend to all cases in law or equity mentioned in that instrument. But, except in the cases especially enumerated in the Constitution, and of which this Court may take cognizance without an enabling act of Congress, the distribution of the judicial power of the United States among the Courts of the United States is a matter entirely within the control of the legislative branch of the Government. And it has never been supposed that Congress, when making this distribution, intended to change or modify the general rule—navigating its foundation in a wise public policy, and deeply imbedded in the jurisprudence of all civilized countries—that the final judgment of a Court (at least one of superior jurisdiction), competent, under the law of its creation, to deal with the parties and the subject-matter, and having

acquired jurisdiction of the parties, concludes those parties and their *privies* in respect to every matter put in issue by the pleadings and determined by such Court. This rule, so essential to an orderly and effective administration of justice, would lose much of its value if it were held to be inapplicable to those judgments in the Circuit Courts of the United States which, by reason of the limited amount involved, could not be reviewed by this Court.

"The inquiry as to the conclusiveness of a judgment in a prior suit between the same parties can only be whether the Court rendering such judgment—whatever the nature of the question decided or the value of the matter in dispute—had jurisdiction of the parties and the subject-matter, and whether the question sought to be raised in the subsequent suit was covered by the pleadings and actually determined in the former suit. The existence or nonexistence of a right in either party to have the judgment in the prior suit re-examined, upon appeal or writ of error, cannot, in any case, control this inquiry. Nor can the possibility that a party may legitimately or properly divide his causes of action so as to have the matter in dispute between him and his adversary adjudged in a suit that cannot, after judgment and by reason of the limited amount involved, be carried to a higher Court, affect the application of the general rule. Whatever mischiefs or injustice may result from such a condition of things must be remedied by legislation regulating the jurisdiction of the Courts and prescribing the rules of evidence applicable to judgments. Looking at the reasons upon which the rule rests, its operation cannot be restricted to those cases which, after final judgment or decree, may be taken by appeal or writ of error to a Court of appellate jurisdiction."—N. Y. Law Journal.

APPOINTMENT OF MINOR AS ADMINISTRATOR VOID.

Individual Liability of Minor Attempting to Act as Administrator.

Supreme Court—General Term.—First Department.

APRIL, 1894.

Present: Hons. Charles H. Van Brunt, P. J.; David L. Follett and Alton B. Parker, J. J.

Katharine L. Knox, respondent, vs Henry Noble appellant.

The appointment by a Surrogate of a minor as administrator of an estate is void, and a contract entered into by a minor so appointed is void, so far as it attempts or purports to bind the estate.

As a person attempting to enter into a contract in a representative capacity, and having no authority to act in such capacity, is bound individually, a minor, appointed administratrix, has a cause of action to set aside, on equitable grounds, a sale purporting to have been made by her as such, in order to relieve herself individually from any claims which might be attempted to be enforced.

Appeal from interlocutory judgment overruling demurrer to the complaint.

H. Hoyt for appellant; L. Birdseye for respondent.

VAN BRUNT, P. J.

This action is brought by the plaintiff individually to set aside a sale attempted to be made by her as the administratrix of her deceased husband, upon the ground that at the time of granting the letters of

administration she was a minor, and that the sale was made under the fraudulent representations and inducements of the defendants, and that the consideration paid was inadequate.

The main question involved upon this appeal is whether letters of administration issued by the Surrogate to a minor are or are not void.

It is argued that, as it is well established that the granting of letters of administration by the Surrogate are conclusive as to his jurisdiction, the question as to eligibility of the plaintiff to the office of administratrix cannot be inquired into collaterally. We think the question as to whether the plaintiff could legally be appointed administratrix of her deceased husband, she being a minor, has no relation whatever to the question as to the jurisdiction of the Surrogate to grant letters of administration; and here is where the confusion has arisen.

An examination of section 2660 of the Code, as it existed at the time of the issuing of the letters of administration in question, will show that the eligibility of a petitioner to appointment as administrator has no connection with the facts upon which the jurisdiction of Surrogate's Court to grant letters of administration upon the estate depends. The section says: "A person entitled absolutely or contingently to administration upon the estate of an intestate may present to the Surrogate's Court having jurisdiction a written petition, duly verified, praying for a decree awarding letters

of administration either to him or to such other person or persons, having a prior right, as may be entitled thereto, or in the alternative as the petitioner elects; and if necessary that the persons required to be cited, as required in the next section but one, may be cited to show cause why such decree should not be made. The petition must set forth the petitioner's title" (it is clear that what is meant by this provision is the relationship under which the petitioner claims) "the facts upon which the jurisdiction of the Court to grant letters of administration upon the estate depends; and the names of the husband or wife, if any, and of the next of kin of the decedent, so far as they are known to the petitioner or can be ascertained by him with due diligence."

It is thus seen that the facts upon which the jurisdiction of the Court to grant letters depend do not include the petitioner's title, and are, by the very language of the section, excluded. And, therefore, when it has been held that the grant of letters of administration is conclusive as to the Surrogate's jurisdiction, it has only been decided that the granting of such letters is conclusive as to the facts upon which the jurisdiction of the Court to grant letters upon the estate depend, and, as already seen, the petitioner's title is not one of them, nor is the petitioner's eligibility to the office. While, therefore, the decree of the Surrogate is conclusive as to all the facts necessary for his jurisdiction, it imports nothing as to the eligibility of the person

to whom the letters are issued. The statute expressly prohibits the granting of letters to a person convicted of an infamous crime, or to one incapable of making a contract, or to a person who is under twenty-one years of age, &c. Can it be said that the Surrogate by his *ipse dixit* can repeal the statute, it being manifest that the question of the eligibility of the person proposed to be appointed administrator is not one of the jurisdictional facts? It would be a monstrous proposition to hold that any judicial officer can, by his mere will, override the express prohibitions of the statute.

The question of the age of this petitioner was in no respect presented to the Surrogate for adjudication; no such issue was before him, and his jurisdiction to appoint an administrator did not depend upon any such inquiry. And in this respect the case at bar differs from those of *Rodrigas vs East River Savings Bank* (63 N. Y., 46 and 76 N. Y., 316) and *Bolton vs Schieren* (135 N. Y., 70).

In those cases the question before the Surrogate was as to his right to act at all, and he having determined the question of jurisdiction, it was held that such adjudication could not be attacked collaterally. The right of the Surrogate in the case at bar to appoint an administrator could not be attacked collaterally; but when he selects a person whom the statutes says he shall not appoint as such administrator, after having determined to appoint such an officer, his act is absolutely void. Such

was the rule laid down in *Carow vs Mowatt* (2 Ed. v. Chy., 38), in which it was held that not only was the appointment of a minor void, but he could not be called to account for any portion of the estate which he had received. It seems, therefore, reasonably clear that the appointment by the Surrogate of the plaintiff was void; and that the contract, as far as the plaintiff attempted to bind the estate of her husband, was also void.

But it is a familiar principle that a person attempting to enter into a contract in a representative capacity, having no authority to enter into such contract in such capacity, is bound individually. And hence, even if this plaintiff had no authority to enter into the contract as the administratrix of her husband, because of the invalidity of her appointment, she would have been held individually had it not been for her minority. And even if the contract was entered into at a time when she was a minor, unless repudiated within a reasonable time after she became of age she might be held upon it. The plaintiff, by this action, comes into Court and seeks to disaffirm this contract, alleging that it was entered into while she was a minor, further alleging that it was obtained by fraud, and that she seeks to avoid the personal responsibility which would arise against her because of her entry into the contract, as administrator of her husband, without having the authority so to act.

It seems to us that she has a right to maintain this action to relieve herself in

dividually from any claims which might be attempted to be enforced against her. The estate which she seemed to represent has no interest in this question. It is not bound by the contract and is not at all interested in the question as to whether the plaintiff individually is or is not so bound. She alone is interested in the question as to whether she is to be liable to the defendants for damages in attempting to enter into a contract without authority.

We are of opinion, therefore, that the judgment should be affirmed, with costs, with leave to defendants to withdraw demurrer, and, on payment of costs of Court below and of this Court, to answer.

FOLLETT and PARKER, JJ., concur.

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Sixth Judicial Circuit.

JUDGES.

Hon. C. S. Bentley, Bryan, O.
Hon. G. R. Haynes, Toledo, O.
Hon. C. H. Scribner, Toledo, O.

CITY GAS PLANT

Is Public Property Within the Meaning of Section 2, Article XII, of the Constitution, and the Legislature has Power to and has Exempted it from Taxation. Construction and Application of Law of 1889, 88 Ohio Laws, Page 95. Meaning of the Word "Town" as Used in that Statute.

(Wood County Circuit Court, April Term, 1894
Present Hons. C. S. Bentley, P. J., Chas. H. Scribner and James H. Day, J.J.)

The City of Toledo vs. Yeager,
Treasurer of Wood County, Ohio.

Opinion by Bentley, J. (Orally.)

In brief, this is an action to enjoin the Treasurer of Wood county from collecting a certain tax which has been assessed upon certain property owned by the City of Toledo, on the ground, as plaintiff alleges, that all of the property so assessed is by law exempt from taxation, and the simple and single question is presented, whether or not the property in question is by law thus exempt. The property is the city gas line, wells, fixtures, machinery and appliances connected with the gas pipe line which was made and acquired by the city under the provisions of the statutes 1889, 86 O.L., p. 7. We have considered and have in view those general principles of equity and justice which the counsel for the parties

here have so carefully discussed orally and in their written arguments, but at last the discussion comes down simply to the concrete and pertains to two main propositions only, and these we must decide in view, of course, of those general principles.

The main question may be considered as of two phases for the consideration of the Court—one is whether the Constitution of the State allows the General Assembly to pass any law that will exempt from taxation property of this particular nature and which is applied to such particular use as is shown in this case, and, the other question is, whether the Legislature have in fact undertaken by a law to exempt this property.

I will briefly call attention to the provisions of the Constitution, which is section 2 of Article XII. and leaving out provisions not germane to this inquiry, the portion of it applicable to it would read as follows: "Laws shall be passed taxing by uniform rule all * * * real and personal property according to its true value in money * * * but public property used exclusively for any public purpose * * * may by general laws be exempted from taxation."

Is the property in question here public property, used exclusively for any public purpose? It is

claimed that it is not. It is argued that while perhaps some of the uses to which this property is applied may be public, yet, other uses to which it is devoted are not public; at least not exclusively public, but private, and therefore the Legislature had no power to exempt it from taxation.

It is argued that property may be public and yet not used exclusively for public purposes, and of course that is true. This property must appear to be devoted exclusively to some public purpose or the Legislature can not exempt it from taxation.

In our view of the case, this question is to all intents and purposes settled by the Supreme Court of the State in the case of the State of Ohio vs. the City of Toledo, 48th Ohio State Reports, at page 112 and following. The Court in that case discuss at length the provisions of the Statute under which this property was acquired, and a great share of the opinion is devoted to the discussion as to whether or not the act is constitutional as it involves the question and necessity of taxation; whether this property is to be so applied to a public use that within the confessed limits of the power of taxation, taxes may be levied for its acquirement and maintenance, and the final conclusion at which the Court arrives is stated in

the second proposition of the syllabus: "The supplying of municipal corporations and their citizens with natural gas is a public use or purpose, for which the taxing power may be constitutionally exercised." Of course the opinion went much more into detail than the mere statement of this proposition, and it renders clear what was intended by the Supreme Court to be embodied in that syllabus.

It was argued there as here that while this gas was to be used partially for the lighting and heating of public structures and public buildings, yet it was also to be applied for the private uses of the citizens, and yet, after considering in many paragraphs that argument, the Court comes to the conclusion that notwithstanding that contemplated use, the whole matter is a public matter, and the property is to be devoted to a public purpose.

Now we think it necessarily follows that if this property is in fact devoted to the purposes contemplated by the act and to those only, that part of the argument is conclusively settled by this judgment of the Supreme Court in State vs. Toledo.

Of course, as stated in the argument of one or more of the counsel, private corporations or individuals might have gone into this business, and it is argued that because the

private property of individuals or a corporations thus engaged in this business of lighting and heating might not be held to be property devoted to a public use, no more is property owned by the city and thus used, devoted to a public purpose, but this argument would exclude the possibility of exempting from taxation nearly all public property, since private means may be devoted to building school houses and public buildings, water-works and the like, and the argument holds good as to this phase of the matter, that the ownership does not in all cases determine whether it is or is not used exclusively for a public purpose; at all events, until the authority of that case is overthrown, we must hold that the Legislature had the authority to exempt this property from taxation.

Has it done so? The eighth paragraph of the law of 1891, which applies to the controversy here, being 88 Ohio Laws, page 95, provides: "All market houses, public squares or other public grounds, town or township houses or halls used exclusively for public purposes, and all works, machinery, pipe lines and fixtures belonging to any town, and used exclusively for conveying water to such town, or for heating and lighting the same." That is, under the provisions of the statute, such property shall be exempt from taxation.

Now eliminating from the eighth

paragraph the words that do not pertain to this property, let me read "and all works, machinery, pipe lines and fixtures belonging to any town and used exclusively for heating and lighting the same." That is really the provision of this Statute upon this subject. It will be noticed that it is not simply the pipe line, but it is all works, machinery, pipe lines and fixtures belonging to any town and used for this purpose. If that does not include within the description all of the property that has been valued and assessed for taxation in the present case, it certainly includes nearly all of it, and if there is anything not included under some of these general names or designations, there is no clear definition of it. There is a general tax and a general valuation of all this property in the aggregate, and there is no pleading or proof in the case as made to this Court, showing the possibility of separating from the whole any property that might, under certain circumstances, be shown not to be such a part and parcel of the description as to be governed by this general law.

The evidence shows this property to be devoted to the very purposes which are named in the Statute and which the Supreme Court has declared to be public purposes. It would be an exceedingly narrow

and technical construction of the language of this exemption paragraph to say that it means that to be exempt the machinery, works and pipe lines and each and every part thereof must be used specifically for heating and lighting the town;—that they must be the immediate agency for making the light and heat.

While rules of construction in these regards require strictness, yet there must not be a strained and unnatural construction. The thing to be arrived at is the intention of the Legislature in passing the Statute, and the Legislature must have known when this Statute was passed that some parts of the "works, machinery and pipe lines" which should be devoted to heating and lighting could not themselves make light or heat, but are essential parts of the mechanism and construction for the production of light or heat. The meaning is the same as if it read "all works, machinery, pipelines and fixtures belonging to any town and used exclusively for the production and furnishing of heat or light for the town."

It is also argued in view of the strict construction that ought to prevail, that, really, this Statute does not include or mention a City, that the City of Toledo is not within its provision, because the words are, "any town," not, "any city."

In strictness there has been no

municipality in this State for a long time legally known as a town, yet all the while there are and have been aggregations of houses and inhabitants known as towns, and the line that marks the size of an aggregation of this kind so as to include or exclude it from the general term, "town," is not and never has been well drawn.

Legally, municipal corporations in Ohio are Cities, villages and hamlets, but, with utter propriety of language, it may be said that there are all over the State, towns, both incorporated and unincorporated; and it is very evident that the Legislature in this act was not speaking with reference to the legal classification of municipal corporations so as to require terms of legal precision, but was making general provisions applicable to towns in the popular sense. This is a general Statute providing for the exemption of public property, and in one of the earlier paragraphs it reads, "all buildings belonging to any county, township or town, used exclusively for the accommodations or support of the poor." If a town must necessarily mean some incorporated municipality, so designated by the law, there is nothing in the State to which to apply this provision, and in various places in the Statute the word, "town," is used plainly in its generic sense and not in its technical sense. It seems to us, though having regard to the strict construction which ought to be given to Statutes exempting property from taxation, still,

most manifestly and clearly, this property designated in this petition and about which testimony has been received, is public property devoted exclusively to a public purpose, and belongs to a town, and is used exclusively for heating and lighting the same. Holding these views, we sustain the petition and grant the injunction prayed for. The temporary injunction heretofore granted is made perpetual and the costs are adjudged against the defendant. It is further ordered that a special mandate be sent to the Court of Common Pleas for execution for the costs.

C. F. Watts for plaintiff.

Parker & Moore for defendant.

BASTARDY.

Second Prosecution. Compromise Bond and Compliance With Requirements of the Statute a Bar to the Second Prosecution. Bond Required by Statute—A Matter in Which Complainant Had no Further Interest.

(Wood County Circuit Court—April Term 1894. Present: Hons. C. S. Bentley, P. J., Charles H. Scribner and James H. Day, J. J.)

The State of Ohio ex rel Cora A. Stacy vs Frank Van Vorhis.

Proceeding in error to Common Pleas Court this county.

Opinion by DAY, J..

The defendant, Frank Van Vorhis, was arrested under the provisions of the law relating to bastardy, February 1893, on complaint of the relator Cora A. Stacy, an unmarried woman, and after examination was bound over to the Common Pleas Court to answer the charge of being the father of the plaintiff's illegiti-

mate child. In the Common Pleas court defendant filed an amended answer in writing to the charge preferred showing, in substance, that in April 1892, nearly a year before, the plaintiff had made the same complaint against him and procured his arrest on the same charge made in this proceeding; that he was taken before a magistrate and that a compromise under the provisions of the statute had been made; that he had settled with the complainant and paid her complete and full satisfaction, which agreement was made before the magistrate and that the same was entered by the magistrate on his docket, and that he had paid the cost of the proceeding and given bond to the state conditioned to save the public from liability in the matter and had been released from custody by the magistrate. A demurrer to the amended answer was overruled and exceptions noted. The allegations in the answer were denied by a reply filed by the complainant. Issues thus made were tried by the court, a jury being waived by the parties, and resulted in finding and judgment for defendant dismissing him from custody. Complainant excepted to the finding and judgment of the Common Pleas court and brings this action in error in this court to reverse the judgment in the Common Pleas.

On request of the complainant.

the court made a finding of facts which, instead of the testimony, was embodied in a bill of exceptions and thus brought before the court. A motion to set aside the findings of fact and for a new trial was overruled by the court, and judgment rendered as I have said. The defendant, by the petition in error, assigns a number of matters as error, some six in number. They all raise the same question, so the errors may be stated and disposed of as one proposition, that is, that the judgment of the court in favor of the defendant is not sustained by the facts found, and is contrary to law.

The facts found by the court are in substance the facts as stated in the amended answer; that defendant had been complained against and arrested in April, 1892, on the identical charge upon which he was again arrested in this proceeding; that under the provisions of Section 5617 Revised Statutes authorizing it, a compromise and bond to the state to save the county, township or municipal corporation from all charges for the maintenance of such illegitimate child. The compromise has been made by the parties, acknowledged before the magistrate and bond given to the state of Ohio conditioned as the law requires, and the agreed amount \$175, was paid and received by the complainant and the costs made before the Justice of the Peace prior to compromise with the defendant paid, and the defendant was

discharged. The compromise in respect to the sum to be paid complainant to reimburse her, and in every other respect, appears to have been just and reasonable, and, under the circumstances of the case, was carried into effect with all the requirements of the Statute at that time, and was noted on the Justice's docket, except the requirement of a bond. That was not complied with until some ten months later, when the defendant, having been at liberty meanwhile, voluntarily returned into custody, surrendered himself to the jurisdiction of the magistrate, and he and his sureties executed the required bond to the acceptance of the magistrate, which fact was noted on the docket by interlineation.

The bond itself is all regular and it is conditioned in accordance with the provisions of the Statute so that the essentials of the said section 5617 were all present, and unless there be something in the mere matter of delay in executing the bond to invalidate it, the first transaction found as fact by the court would be a complete bar to the second prosecution. The bond appears to have been executed by the accused and sureties in the utmost good faith and upon a good consideration. It is not invalid and can be enforced, if necessary for the maintenance of her child. Invalidity of the bond is not suggested by the facts found, and, if it were, it is not clear that the complainant has such interest in the matter that she can raise the question in this or any other manner. The com-

promise was reasonable and contained not one element of fraud or unfairness but was entirely just, and had the effect to discharge her claim in the matter and leave her in the position so that the subsequent proceedings would interest her no more.

The duty of seeing to the execution of that indemnity was by the law vested in the magistrate before whom the defendant was in custody, and after some delay this was done, and a bond was given. According to the facts found and stated on the record there was no error in the judgment of the Common Pleas court, and the judgment is affirmed with costs.

James. & Beverstock for plaintiff in error.

A. R. Campbell for defendant in error.

New Laws.

COLUMBUS, O., MAY 11-94.

S. B. No. 293 amends 2732, relating to exemptions from taxation as follows:

Sixth—All buildings belonging to institutions of purely public charity and all buildings belonging to and used exclusively for armory purposes by lawfully organized military organizations which are and shall continue to be fully armed and equipped at their own expense by law made and subject to all calls of the governor for troops, in case of war, riot, insurrection or invasion, together with the land actually occupied by such institutions and that owned and used as its sites for such armory buildings of said military organizations, not leased or otherwise used with a view to profit, and moneys and credits appropriated solely to sustain, and belonging exclusively to said institution and military organization.

Ninth—Each individual residing in this

state may deduct a sum not exceeding one hundred dollars, as exempt from taxation from the aggregate listed value of his taxable personal property of any kind of which the individual is the actual owner, except dogs.

S. B. No. 184 amends article 10, section 2232, relating to the appropriation of real estate by cities and villages follows:

10. For public parks, * * * after a notice of not less than thirty days, given in two newspapers of opposite politics, if there be such published in said village or city, or in writing; and after the proposition to purchase and appropriate has been voted upon and approved by a majority of those voting upon the proposition; and for this purpose the right to appropriate shall not be limited to lands lying within the corporation; and after such affirmative vote the council shall have the right and power to issue the bonds of said village or city, in payment of the amount fixed by the court by proceedings in condemnation as to the value of said property.

S. B. No. 225 repeals section 2123.

S. B. No. 174 amends section 3654 (as amended April 11, 1893), relating to annual statements of the business of insurance companies.

S. B. No. 12 is a new law to prohibit the sale of within and the shipment of quail from the state, as follows:

SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That no person shall at any time kill any quail for the purpose of conveying the same beyond the limits of this state, nor for the purpose of sale in the markets of this state, or shall transport, or shall have in possession with intention to procure the transportation beyond said limits, any of such birds killed within this state. The reception by any person within this state of any such birds for shipment to a point without the state, shall be *prima facie* evidence that said birds were killed within the state for the purpose of carrying the same beyond its limits.

SECTION 2. Any person violating any of the provisions of the preceding section, shall be fined not less than twenty-five

dollars nor more than fifty dollars for each and every offense.

S. B. No. 32 amends section 2677 as follows:

Sec. 2677. Such owner or possessor may dig, or cause to be dug, any such cellar, pit or excavation, to the full depth of any foundation wall of any building upon the adjoining lot or lots, or to the full depth of nine feet below the established grade of the street whereon such lot abuts, without reference to the depth of adjoining foundation wall, without incurring the liability prescribed in this chapter, and may, on thirty days' notice to adjoining owner, grade and improve the surface of any lot to correspond with the established grade of the street or alley upon which it abuts without incurring liability.

S. B. No. 334 amends section 676, relating to the Ohio Soldiers' and Sailors' Orphans Home at Xenia, and is as follows:

Sec. 676. The trustees are authorized and required to receive into the home, under such rules and regulations as they adopt, the children and orphans residing in Ohio of such soldiers and sailors who have died or may hereafter die by reason of wounds received or disease contracted in the late civil war, that are found to be destitute of means of support and education; and the children, also, of permanently disabled or indigent soldiers and sailors of said service found destitute as aforesaid; and all children admitted shall be supported and educated until they are sixteen years of age, unless for good cause sooner discharged. The board of trustees may, however, * * * retain such children until they arrive at the age of eighteen years, and also retain all children who are members of the graduating class until the close of that school year.

S. B. No. 166 supplements section 2680, the provision is for Hamilton, and is as follows:

Sec. 2680b. That in all counties in which there is such library association mentioned in 2680, and in which there is

a city of the third grade b of the second class, and in which there is no such police court, that all fines and penalties which are assessed and collected by the mayor of said city, prosecuted in the name of the state or city, shall be paid quarterly by said mayor to the trustees of such library association, to be expended in the purchase of law books and the maintenance of such association; but the sum so paid shall not exceed five hundred dollars per annum, and should be subject in all other respects to the provisions contained in section 2680.

S. B. No. 212 amends sections 2777, 2778, 2778a, 2779 and 2780, relating to express companies.

H. B. No. 202 supplements chapter 4, title 1, part 4 of the Revised Statutes as follows:

Sec. 688oe. Whoever, being about to enter unlawfully upon the inclosed or uninclosed lands or premises of another, and shall be forbidden to so do by the owner or occupant, or his agent or servant, or who being unlawfully upon the inclosed or uninclosed lands or premises of another, shall be notified to depart therefrom by the owner or occupant, or his agent or servant, and shall thereafter enter upon such lands or premises, or neglect or refuse to depart therefrom, except persons who are crossing said lands or premises for some lawful purpose, with the consent of the owner of such premises shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one nor more than five dollars, and shall pay the costs of prosecution.

H. B. No. 735 amends section 1672, relating to village councils, the amendment being a local provision and applies to Zanesville, Muskingum county.

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Toledo Legal News.

OFFICIAL LAW JOURNAL OF LUCAS COUNTY, OHIO.

In the matter of the designation of a daily Law Journal in Lucas County. As required by Sec. 1 of an Act passed April 14th, 1884 and amended Feb'y 25, 1890, entitled "An Act relating to the posting of court calendars and legal notices in certain counties," as amended May 9, 1894, the Judges of the Courts of Record in said County other than the Circuit Court, hereby jointly designate the TOLEDO LEGAL NEWS, a daily law journal published in said County, as the journal wherein until the further order of said judges, shall be published all the notices, advertisements, abstracts and matters and things specified or referred to in said Section 1.

Approved { GILBERT HARMON,
REUBEN C. LEMMON,
ISAAC P. FUGSLEY,
Judges of Common Pleas.
I. I. MILLARD, Probate Judge.

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SATURDAY, MAY 26, 1894.

WORTH CONSIDERING.

Last week the LEGAL NEWS, daily edition, was made the official Law Journal of Lucas County, as will appear from the entry to be found at the head of this column.

The appointment has no immediate reference to or effect upon the weekly but the official recognition, with the revenue, serves to indicate the standing of our paper at home and solidifies the enterprise, which at present carries the burden of both publications.

In Lucas County we need no guaranty to secure the hearty support of the bar but elsewhere, in places where we are entirely unknown, some attorneys have shown a disposition to "wait and see." One lawyer said; "Well, your weekly is a good thing, just what every practicing attorney needs, but will it last?" We assert most emphatically that it will; that it has already secured sufficient support to insure permanency; its perfection may be, in a measure, delayed by tardy sup-

port, but we are not anticipating this. Men who are unwilling to promptly support, thus helping toward success, something they desire to see successful are not common among attorneys.

Every number of the LEGAL NEWS may be worth the price of a year's subscription; certainly worth seventy-five cents, the amount necessary to secure the paper for three months. We made the three months offer, in order to introduce the paper, but must admit we are not making any special effort to secure short term subscribers. The detail work of looking after such subscriptions requires too much valuable time. The offer is still open, however, as we are satisfied that those who take the paper for three months will remain with us after the expiration of that time.

We will have more room for decisions in future numbers of the LEGAL NEWS; the space devoted to New Laws will hereafter be occupied by Circuit Court decisions. We do not need to be told that we are behind in respect to that Court, particularly with reports from Wood County. Unusually large dockets in Wood and Huron Counties have demanded so much time that the Judges have not been able to revise reports of all decisions to date, although some were rendered several weeks ago. The delay is unfortunate for us but it seems, at present, to be unavoidable.

CONCERNING NEW LAWS.

The law increasing the salary of Common Pleas Judges will not affect present incumbents. It is, however, a step in the right direction and it is hoped that by the time the General Assembly of Ohio meets again the importance of larger salaries and longer terms for Judges of the Supreme Court will be appreciated. The people cannot insure better government or practice truer economy than by offering, in all judicial spheres, sufficient to constitute a reasonable compensation for

the services of the best and ablest men the state affords.

Such of the new laws passed during the closing hours of the General Assembly as are of sufficient importance to warrant publication, will appear in our next issue. Acts were passed making changes in the 2d and 5th Judicial Districts; another new law provides for taking up, in the Circuit Court, personal injury cases in advance of their assignment where the person injured, or in case of death the widow or next of kin, makes affidavit that they are dependent for their livelihood upon their daily bread.

STATE BAR ASSOCIATION.

A meeting of the Executive Committee of the State Bar Association has been called for to-day at Columbus. It will be held for the purpose of preparing a program for the annual meeting at Put-in-Bay June 20th, 21st and 22nd.

IN OTHER FIELDS.

During the course of a trial at Derby Assizes, on Saturday, Mr. Justice Hawkins made some strong comments on the fact that the prisoner had been arrested immediately on leaving prison. After the prisoner had been acquitted on the charge of larceny, for which he was tried, the judge said that it was too common a practice to arrest a man on the prison steps. Everything that was known against the prisoner ought to be brought to the knowledge of the judge at the time of trial, and a man ought not to be arrested directly he came out of prison for an offense committed before that for which he had just suffered. It was a disheartening thing for a man to be taken into custody the moment he left prison. The learned judge's remarks caused much applause in court.—Solicitor's Journal, London, March 3.

ERROR IN SCHOOL BUILDING BID.

An important precedent was established by Judge Windes of Chicago, Ill., recently in deciding a suit commenced by one Crilly, a contractor, against the Board

of Education. In August, 1862, Crilly submitted a bid for \$20,997 for building the foundations for a school. With the bid he deposited the usual 3 per cent. or \$630 as earnest money. He was awarded the contract, and immediately afterward notified the board that there was an error in his estimate, which should have been \$23,997. Leave was asked to amend his bid and this being refused he demanded the return of his \$630. Both of these proposals were refused by the board. Mr. Crilly then commenced proceedings in chancery, asking the court to give him permission to reform his bid or to get back his earnest money. He explained that the error was a clerical one, caused by the careless copying of the figures in his estimate book. In resisting his claims Donald Morrill, who represented the Board of Education, said it was against the usages of the trade to permit such corrections. The view was upheld by Judge Windes, who decided in favor of the Board.—American Lawyer.

U. S. District Court.

171—S. R. Callaway, Recr vs Orient Ins. Co. Exceptions to answer and to interrogatories. Brown & Geddes, Proctors.

U. S. Circuit Court.

1058—Dan'l M. Kennedy vs Solar Refining Co; order for taking testimony of complainant as to inability to secure security for costs.

1182—Farmers Loan & Trust Co. vs T A A & M Ry Co. Order for Cassie Alberts admx. and Ida Beaulien admx. to file security for costs on their int petition.

1205—Continental Trust Co. vs T St L & K C R R Co. Answer of Receiver to int petition of Catherine Ragan, filed.

1193—Wm C. Niblack, Recr vs S. W. Reed, Assignee. Deposition on behalf of debts.

1182—Farmers Loan & Trust Co. vs T A A & N M Ry Co. Amendment to answer of Int. Petition of Ida Beaulien admx filed. A. L. Smith, atty.

1182—Same vs Same. Amendment to answer of Int. Petition of Cassie Alberts admx filed. Same atty.

Common Pleas Courts OF OHIO.

The following are among the important and interesting decisions of a recent date.

ACTION BY EXECUTOR

To Obtain Judgment of the Court as to the True Construction of a Will. Dismissed for Want of Jurisdiction.

Court of Common Pleas of Lucas County, (April Term, 1894.)

Walter J. Chase, Eugene W. Gage,
vs. Armina D. Isherwood, Libbie
M. Isherwood.

1. An action can be maintained by an executor under sec. 6202, R. S., to obtain the judgment of the court as to the true construction of a will, only in cases where a trust is involved or where the executor has duties to perform, in carrying out the provisions of the will, which require the guidance or direction of the court.

2. A testator devised to his widow "the proceeds of his real estate." The will contained no residuary clause and made no other disposition of his real estate and gave no directions in relation thereto, and no authority or control over the real estate was given to the executors. *Held*, that no trust was created by the will, and no duties of the executors required the guidance or direction of the court, and that a petition filed by the executors under sec. 6202, R. S., should be dismissed for want of jurisdiction.

PUGSLEY, J.

The plaintiffs are the duly qualified executors of the last will and testament of Francis P. Isherwood, deceased. The defendant Armina D. Isherwood is the widow and the defendant Libbie M. Isherwood is the adopted daughter of the deceased. The testator by the first clause of his will directed that his debts be paid by his executors out of his estate. By the second clause he gave to his daughter the sum of \$10,000, to be paid by his executors in installments as his executors think best or the situation of circumstances may require. The third clause of the will is as follows: "I hereby give and devise to my dear wife, Armina D. Isherwood, in lieu of dower in my real estate, and in full of all rights of any kind in my personal and real estate, all of my

personal estate of any and every kind remaining after the payment of my just debts and funeral expenses and the bequest of ten thousand dollars to my daughter Libbie M. Isherwood, and also the proceeds of my real estate."

In the remaining three clauses he appointed executors of his will and guardians of his daughter and revoked all former wills.

The plaintiffs have brought this action under *Sec. 6202, R. S.*, to obtain the judgment of the court as to the proper construction of the third clause of the will, it being alleged in the petition that they are in doubt as to the true construction of said third clause, and that they desire to be instructed as to their duties.

Sec. 6202, R. S., is as follows: "Any executor, administrator, guardian or other trustee may maintain a civil action in the Court of Common Pleas against the creditors, legatees, distributees, or other parties, asking the direction or judgment of the court in any matter respecting the trust, estate or property to be administered, and the rights of the parties in interest, in the same manner, and as fully as was formerly entertained in courts of chancery."

A question is raised as to the jurisdiction of the court which it becomes necessary to determine, for unless the court has power under this section to construe the will, any judgment which it might render as to the true intent or meaning of the will, would be merely the expression of its opinion upon an ab-

stract question and would have no binding force or effect upon the parties. The weight of authority is that the jurisdiction of courts of chancery to construe wills is simply an incident of the general jurisdiction over trusts and that a suit will not be entertained which is brought solely for the purpose of interpreting the provisions of the will without any further relief or when the will makes no attempt to create any trust relations with respect to the property donated. Even by courts which take a more enlarged view of the jurisdiction, it is held that a suit will not be entertained to construe a will upon a state of facts which has not yet arisen nor upon a matter which is future and uncertain, nor unless the construction will determine and direct some present or continuing act or conduct of the executor or trustee, 3 *Pomroy's Equity Secs.* 1156 and 1157, *Rothgeb vs Mauk* 35 O. S. 503. In the case of *Collins vs Collins*, 19 O. S. 468, it is held that an action brought for the mere purpose of obtaining the opinion of the court upon the construction of a will cannot be maintained in cases where no trust is involved. In the case of *Corry vs Fleming*, 29 O. S. 147, it is held that when no trust is involved and no advice or guidance to an executor or other trustee is required, parties claiming under or against a will cannot maintain an action for the mere purpose of obtaining the court's opinion as to its meaning or legal effect. In view of these authorities the most that can be claimed is that an action can be maintained under the statute

only in cases when a trust is involved or when the executor has duties to perform in carrying out the provisions of the will, which require the guidance or direction of the court.

It is contended by the plaintiffs that a trust is created by the will, which requires the Executors to convert the testator's real estate into money, and pay the proceeds thereof to the widow. This claim is based solely upon that part of the third clause in which the testator gives to the widow "the proceeds of my real estate." To determine whether a trust is created or whether such a duty is imposed upon the Executors by the will as is claimed, it is necessary to ascertain what is meant by the words "proceeds of my real estate." These words in themselves have no well defined legal meaning.

In *Thompson's Appeal*, 89 Pa. St. 36 the court say, "The word, 'proceeds' is a word of equivocal import. Its construction depends very much upon the context and the subject matter to which it is applied. If a testator should direct his property to be sold and the proceeds to be disposed of in a certain manner, no one could doubt that the whole corpus or principal was intended. Should he order it to be rented or invested, then proceeds would necessarily be limited to the net income, especially if the interest was given for life only." In this will the testator devised to his widow the proceeds of his real estate. There is no residuary clause and no other clause

which contains any reference to any other disposition of his real estate, near or remote. There is no direction that the real estate shall be sold nor that anything shall be paid out of the proceeds, and no authority or control of any kind is given over the real estate to the executors. There is simply a direct devise to the widow of the proceeds of the real estate and that is all.

The great weight of authority is that a devise of the rents and profits of land or of the income of land is a devise of the land itself and carries the legal as well as the beneficial interest therein. The devise will be for life or in fee according to the limitations expressed in the devise, and when the devise is unlimited, it vests in the devisee an absolute title in fee. *Davis vs Williams*, 85 *Tenn.*, 646; *Druselow vs Wilde*, 63 *Pa. St.*, 170; *Bowen vs Swander*, 121 *Ind.* 175; *Mannex vs Greener*, 14 *Equity Cases*, (L. R.) 456.

In the case of *Carlyle vs Cannon*, 3 *Rawle*. 488, it was held that a devise of the third part of the proceeds of an estate is equivalent to a devise of a third part of the estate itself.

In the case of *Hunt vs Williams*, 126 *Ind.* 493, it was held that a devise to the wife of one-half of the proceeds of a farm vested in the widow, an interest in land. The Court say, "The word 'proceeds' is one of equivocal import and of great generality. It does not necessarily mean money, its meaning in each case depending very much upon the connection in which it is employed and the subject matter to

which it is applied. Here was a direct devise to the widow, no trust was created, and no duty was laid upon anyone to take possession of the farm, and render it productive of income. A devise of the proceeds of real estate is not materially different from a devise of the income and the rule is that a devise of the income of land carries an estate in the land."

In the case of *Crain vs. Wright*, 114 *N. Y.*, 307, the testator gave fifty acres of land to his widow to have and to hold for her benefit and support. The statute of N. Y. provides that upon a devise of land, all the estate of the testator passes unless an intent to pass a less estate is necessarily implied. It was held that no intent to pass a less estate than a fee could be necessarily implied in the terms of the devise, and that the widow took a fee. Our own statute (Section 5970, R. S.) is similar. It provides that every devise of lands, tenements or hereditaments, shall be construed to convey all the estate of the devisor therein, *unless it shall clearly appear by the will that the devisor intended to convey a less estate.*

In the case of *Collier vs Grimesey* 36 *O. S.* 21 Judge White in delivering the opinion of the court, says: "We do not question that a devise of the rents and profits or of the profits and benefits of land without qualification or limitation will impliedly carry the fee, but such terms cannot be held to carry the fee; *when it appears from other parts of*

the will that the fee is otherwise disposed of."

Independently of some statutory provision the executor has no power to sell land unless he is directed by the will to do so either expressly or by implication. No authority is cited that such power is implied solely from a devise to another of the proceeds of land and it does not appear that such power is needed to carry out any of the provisions of the will. It is sufficient to say for the purposes of this case that no trust is created by the devise to the widow of the proceeds of the testator's real estate and that the will imposes no duties upon the executors with reference to the real estate. The real question sought to be determined in this action, namely, whether the widow has the fee of the land, as claimed by her, or only a life estate with remainder to the daughter, as claimed by the daughter, is a question solely between the widow and daughter and one with which the executors have no concern. In the case of *Rhea vs Dick*, 34 O. S. 420 it was held that a person in possession of real property may maintain an action to quiet his title against a person who claims an estate or interest in the property adverse to the title of the party in possession and that it is not necessary that the adverse claim should relate to or affect the right of present possession. In that case the claim of the defendants was to a vested remainder in fee, subject to a determination of a life estate in the plaintiff, and the action was held to be rightly brought. Whether under the au-

thority of that case, the widow may bring an action to quiet her title against the adverse claim of the daughter it is not necessary to decide, but for reasons already stated my conclusion is that no binding judgment can be rendered in this action as to the proper construction of the will. The petition is therefore dismissed on the ground that the court has no jurisdiction of the subject of the action.

J. W. Cummings for plaintiffs.

J. K. Hamilton for defendant,
Libbie M. Isherwood.

APPLICATION TO ENJOIN PENDENTE LITE OPERATION OF MACHINERY IN ADJOINING BUILDING DENIED.

Noise and Vibration Complained of do Not so Clearly Constitute a Nuisance as to Warrant Injunction Before Trial.

(Court of Common Pleas—Special Term.)

MAY, 1894.

Joseph McGuire, plaintiff, vs Lyman G. Bloomingdale and ano., defendants.

Motion for injunction *pendente lite*.

William Hildreth Field for the motion.

Otto Horwitz opposed.

BOOKSTAVEN, J.

The plaintiff seeks to obtain a preliminary injunction pending this action, which shall restrain and enjoin the defendants from running the engines, machinery and electric light plant in their premises, also, from running the pneumatic blower used for the conveying of cash receptacles in tubes to and from the rooms and counters in defendants' place of business, and also from loading and unloading goods in front of plaintiff's premises, and also from allowing their em-

ployees to stand in front of plaintiff's premises.

From the papers it appears that the defendants are drygoods merchants, occupying a large building on the corner of Third avenue and Fifty-ninth street, covering the entire front on Third avenue, and six or eight houses on Sixtieth street, down to the plaintiff's premises. It also appears that the machinery, the running of which the plaintiff seeks to enjoin, is necessary for the proper lighting and heating of their premises. The dynamos complained of are shown by defendant's affidavits to be noiseless, and do not cause vibration of the buildings in which they are used, and that the pneumatic blower creates but little noise. The defendants also deny that they load or unload their wagons in front of plaintiff's premises, or that their employees congregate in front of the same. They show, on the contrary, that all goods are delivered on Fifty-ninth street and not on Sixtieth street.

It cannot be doubted that a Court of equity has jurisdiction to interfere by injunction to prevent the erection or maintenance of a nuisance which will produce a serious or irreparable damage, but in all such cases it must clearly appear that the thing ought to be prohibited is a nuisance, and of a character to do the plaintiff irreparable injury if not at once prevented. If this is not done the Court will not interfere (*The Mohawk Bridge Co vs The Utica & Schenectady R. R. Co.*, 6 Paige p. 555; *Hudson & D. Canal Co. vs N. Y. & Erie Ry Co.*, 9 Paige, 322).

While preliminary injunctions which only prevent the defendant from doing an act which would render the final judgment ineffectual are freely granted, those which in effect determine the litigation, and give the same relief which it is ex-

pected to obtain by the judgment, should be granted with great caution, and only when required by imperative necessity (*Bronk vs Riley*, 50 Hun, 489; *Ives vs Smith*, 3 N. Y. Supp., 645; 12 Abb. N. S., 410; *Young vs Campbell*, 75 N. Y., 521; *Electric Power Storage Co. vs Whiting*, 17 Weekly Dig., 263).

And again, regard should be had to the nature and extent of the injury which the plaintiff would suffer if the injunction should be withheld, as well as to the consequences to the defendant if the injunction should it be granted *pendente lite* (*Bruce vs Canal Co*, 19 Barb., 391).

In the latter case the Court says: "It is not every case, even of a clear violation of the plaintiff's right, that entitles him to an injunction to restrain such violation." Against an act, which is not in itself necessarily a nuisance, the injunction should not be granted until the question whether it is a nuisance or not has been determined in a preparatory issue (*Mapleson vs Del Puente*, 13 Abb. N. C., 144).

Under all the facts in this case, I do not think the noise, if any, or the vibration are sufficient, to constitute a nuisance. Whether noise alone constitutes a nuisance depends upon circumstances. Trifling or occasional noises, dependent upon the ordinary use of property or in pursuance of an ordinary trade or calling, do not ordinarily constitute a nuisance, although those in the neighborhood are disturbed. The quality or character of the noise may be an important element in determining the question of nuisance or no nuisance. The fact that certain persons annoyed are supersensitive is not to be taken into account, the average susceptibility being the test. The matter of locality has much to do with whether it

is a nuisance or not. In the case under consideration, the plaintiff's premises are within a few doors of Third avenue, where the elevated railroad and cable railroad are in constant operation, and it is a notoriously busy thoroughfare; and the same is true of Fifty-ninth and Sixtieth streets. In fact, it was claimed on the argument that the lower portion of the plaintiff's premises was itself used for business purposes. One would not choose such a place for quiet or peaceful enjoyment. One dwelling in the midst of a crowded commercial centre cannot have or claim the same quiet and freedom from noise or jarring that he could in a quiet country district. Every one taking up his abode in the city must encounter some of the inconveniences and annoyances incident to such communities. As was said by Lord Westbury in *Rippling vs St. Helen's Smelting Co.* (116 E. C. L. R., 608); "If a man live in a town, of necessity he must submit himself to the consequences of the operation of trade which may be carried on in his immediate neighborhood, which are actually necessary to trade and commerce, also for the enjoyment of property and for the benefits of the inhabitants of the town. If a man lives in a street where there are numerous shops, and a shop is opened next door to him and is carried on in a reasonable and fair way, he has no ground for complaint because to himself there may arise much discomfort from the trade carried on in that shop."

Hence it is said the production of mere inconvenience resulting from the exercise of trade will not be restrained (*Wood on Nuisances*, 175, 1175).

In the case of *Huckestine App.* (70 Pa St., 102), it was held that a Court of Equity will not restrain the exercise of a

trade producing smoke and injurious vapor where there are similar establishments in the same locality, and I think the same is true of noise.

A party may rightfully and lawfully prosecute a lawful business upon premises adjoining his neighbor, without interference from his neighbor, unless the mode of conducting the business has been, or threatens to be, such as to materially injure the plaintiff's property or to interfere with the comfortable existence of such of their tenants as are reasonable people, able and willing to enjoy life "subject to the inconvenience necessarily resulting from the reasonable use by a neighbor of his own land." "It is essential that noise to constitute a nuisance must be unusual, ill-timed or deafening."

The noise produced by the machinery of the defendants in the case under consideration is not, I think, unusual. It is such as is ordinarily incidental to the operation of similar machinery used in the conduct of like business in other parts of the city. So it has been recently held in this Court that a blacksmith's forge will not be interfered with because it is not pleasant for the neighbors (*Smith vs Ingersoll Sergeant Rockdrill Co.*, and cases there cited; opinion by Judge Bischoff at Equity Term, filed February 2nd, 1894). And the same was held in *Doelner vs Tynan* (38 How. Pr., 182).

On the other hand, it appears from the papers that the defendants would be put to much expense and great inconvenience if they were prohibited from using the pneumatic delivery. It would almost stop trade in the shop for a considerable period of time, and it is doubtful whether anything could be devised which would be less annoying to the plaintiff than the system now adopted.

For all these reasons, I think the injunction should be refused at present, and only granted if, after a full hearing of both sides upon the trial of the merits, it should appear that the noise complained of and the vibration is really caused by the machinery, and is detrimental to the proper use of the plaintiff's premises.—*N. Y. Law Journal.*

FIXTURES.

What Constitutes—Steam Radiators and Valves.

In *National Bank of Catasauqua vs North*, decided in the Supreme Court of Pennsylvania in March, 1894 (28 Atl., 694), it was held that radiators and valves, which may be readily detached from the distributing pipes by which a company supplies a dwelling with steam for heating purposes, are not a part of the realty, though the owner of the house, when he put them in, may have had an undisclosed intention of making them such.

The Court says, in part: That a steam-heating apparatus is indispensable to the occupancy and enjoyment of a dwelling house, as such, cannot be pretended. That it is a convenience whose presence may enhance the rental value and the comfort of a house may be very true (see *Jarechi vs Society*, 79 Pa. St., 403, 405). That, as a means of heating dwellings, it will in a short time be superseded by something superior to it, seems but reasonable expectation. Of no such appliances can it be said that they are of such a nature or character as to be necessary to carry out the obvious purpose for which the building was erected, permanently to increase its value for occupation and use, or to constitute lasting accessions to the property. The same considerations of personal comfort, convenience and safety that calls for their adoption at one time will require the discarding of them later on. So far as they consist of movable articles merely standing upon the floors, though screwed to pipes, in walls or under floors, their relation to the realty itself is no different from that of any other sort of detachable heating apparatus, from a portable furnace down to a gas stove, and the consequences of their severance from the realty are precisely the same in kind. There is, in a word, nothing in the act of introducing such article into a dwelling house, and nothing in their nature, object, purpose or relation to the house which can give rise to an inference that

they were put there to be a part of the realty, or to increase the security of its mortgagee. There is certainly no more reason for indulging such a supposition with respect to such than with respect to gas fixtures. Steam heat is furnished to houses by steam-heating companies in the same way in which gas is furnished by gas companies. Indeed, the use of gas is far more general in dwelling houses, and it is far more of a necessity to their enjoyment and occupation as such than steam-heat. Moreover like in the apparatus here in question, so where gas is used it is introduced by means of service pipes entering the cellar, vertical pipes conducting it to the upper floors, and distributing pipes carrying it to the various rooms, some of which pipes are exposed, others imbedded in the walls, others laid under the floors. Again, analogously to the proven relation of the radiators and the valves attached to them to the remainder of the steam heating apparatus, the removal of the brackets and chandeliers, with their burners and stopcocks, renders the entire system of gas pipes in a house from which they are detached useless for the time (see *Sewell vs Angerstein*, 18 Law T. [N. S.], 300, per Willes, J.) But gas fixtures are very uniformly held to be severable from the realty, whether the question of their annexation to it arise between landlord and tenant, vendor and vendee, or purchaser of the personality and mortgagee of the realty (*Ewell, Fixt.*, p. 93, note; *Id.*, pp. 299, 436, note; *Vaughen vs Haldeman*, 33 Pa. St., 522; *Jarechi vs Society*, 79 Pa. St., 403; *Heysham vs Dettre*, 89 Pa. St., 506; *Seeger vs Pettit*, *supra*; *Lawrence vs Kemp*, 1 Duer, 363; *Shaw vs Lenke*, 1 Daly, 487; *Manning vs Ogden* [Sup.], 24 N. Y. Supp., 70; *Kirchman vs Lapp*, [Super. Buff.], 19 N. Y. Supp., 831; *McKeage vs Insurance Co.*, 81 N. Y., 38; *Hays vs Doane*, 11 N. J. Eq., 84; *Guthrie vs Jones*, 108 Mass., 191; *Towne vs Fiske*, 127 Mass., 125; *Montague vs Dent*, 10 Rich. Law, 132); the only authority to the contrary in this country that I am acquainted with being *Johnson vs Wiseman* (14 Metc. [Ky.], 357). Of course, express stipulations may make

them pass with the realty (*Jarechi vs Society, supra*; *Heysham vs Deltre, supra*; *Fratt vs Whittier*, 58 Cal., 126; *Sewell vs Angerstein, supra*); or an intent to do so may be so clear from the attending circumstances and expressions as to have the same effect (*Ewell Fixt.*, p. 300; *Funk vs Brigaldi*, 4 Daly, 359; *Central Trust & Safe Deposit Co. vs Cincinnati Grand Hotel Co.*, 26 Ohio Law J., 149). But, in the absence of such an element, the rule as above stated seems very well settled. In this connection, however, it must not be overlooked what is meant by gas fixtures. There is a clear distinction, pointed out in *Vaughen vs Haldeman* (33 Pa. St., at page 523, reiterated in *Jarechi vs Society*, 79 Pa. St., at page 408, and recognized in *Ewell, Fixt.*, p. 299, and cases there cited), between gas fittings and gas fixtures, the former term including all the piping down to the points of opening where chandeliers, brackets, &c. used for lighting are designed to be attached, the latter only covering those attachments. It is these exclusively to which the rule I have given applies. The analogy between the arrangements for lighting dwelling houses with gas and those for heating such with steam seems to me to be so complete that this distinction must also obtain as to the latter, under the decisions of this state. For this reason I must regard the case of *Jenkins vs Gething* (2 Johns. & H., 520, cited in *Ewell, Fixt.*, p. 129, note), as inapplicable here, and decide that the only portions of a steam-heating apparatus in a dwelling house that do not ordinarily become part of it in such a way as to prevent their being separated as personalty from the real estate are the radiators with the valves attached to them. Whilst the traps, regulators, service and distributing pipes, risers, and the valves belonging to them may fairly be considered as necessary to the completion of a modern dwelling house where the facilities for steam-heating exist, and must, in the nature of things, be substantially the same in every case, varying only in dimensions, the radiators, with their valves, are put up in more or less expensive style, according

to the taste and means of the person who intends to occupy the house, or according to the purposes for which it may be designed as a dwelling for his own family or as a house to be rented to others. Hence, upon grounds precisely analogous to those pointed out in *Jarechi vs Society (ubi supra)*, they, and they alone, are not to be regarded as intended to be annexed to the realty."—N. Y. Law Journal.

New Laws.

COLUMBUS, MAY, 19, 1894.

S. B. No. 79 amends sections 3821c and 3821f as follows:

Sec. 3821c. Companies organized under the acts to which this is supplementary, and engaged * * * in the business of safe deposit and trust companies, in addition to the powers already possessed, shall have the power to take, accept and execute all such trusts of every description as may be committed to such company by any person or persons, or any corporation, by grant, assignment, devise or bequest, or which may be committed or transferred to, or vested in said company, whether the same be to act as executor, administrator, assignee, guardian, receiver or trustee, or in any other trust capacity, by order of any court of record or Probate court, in the county in which such company is located, and its principal business is transacted, or of any court of record or probate court of any other state, or of the United States, to receive and take any real estate which may be the subject of any such trust, and to act as agent under any power. Provided, any such appointment as guardian shall apply to the estate only, and not to the person.

Sec. 3821f. The provisions of sections 3821c, 3821d, and 3821e, relating to the power of the probate court to appoint any such company to act as executor, administrator, assignee, guardian, receiver or trustee, shall apply only to probate

courts in counties containing a city of the first or second grade of the first class.

S. B. No. 283 amends section 621 as follows:

Sec. 621. Justice of the peace, for services rendered, shall be entitled to the following fees: For summons, for each defendant named in the writ, 25 cents; for order of arrests, *capias*, writ of attachment, writ of replevin, or mittimus, 40 cents; for each subpoena for one person, 25 cents; for each person in addition named in the subpoena, 5 cents; for venire for jury, 40 cents; for issuing execution, 40 cents; for warrant in criminal cases, for each person named in the writ, 40 cents; for each search warrant, 40 cents; for writ of restitution, 40 cents; for taking and certifying affidavits, 40 cents; for order on jailer for prisoner or prisoners, 40 cents; for entering a discontinuance or satisfaction, 20 cents; for entering bond or undertaking, by either party, 40 cents; for filing papers necessary to be preserved by justice, 5 cents; for each recognizance of bail in civil causes, 40 cents; for bill of exceptions and copy, 15 cents for each one hundred words; for certifying the same, 25 cents; for transcript from docket, 15 cents per hundred words, and for certifying the same, 25 cents; for appointing guardian for minor to prosecute suit, 25 cents; for appointing special constables or appraisers, 40 cents each; for taking recognizance of a witness, 40 cents; for each additional witness, 10 cents; for each recognizance of bail in criminal causes, 40 cents; for each continuance or adjournment by either party, 20 cents; for entering a rule of reference or copy thereof, 15 cents; for swearing witnesses or arbitrators, 5 cents each; for entering judgment, 40 cents; for acknowledging deeds or other instruments of writing, with a certificate thereon, 40 cents; for sitting in

the trial of any cause, civil or criminal, where a defense is interposed, whether tried to the justice or to a jury, one dollar; for judgment on the docket, 14 cents; for collections made upon judgments the same fees as are allowed by section 622 of the revised statutes to constables for money made on execution; for taking deposition and certifying the same, 10 cents per hundred words, for marrying and making return, \$2; for taking and certifying proof of any account or claim against the estate of testators or intestates, 25 cents; for each process required by law not herein named, 40 cents; for each writing or record not provided for, 15 cents per hundred words; and all justices of the peace and notaries public shall, upon request, administer and certify to all oaths required in procurement of bounties and pensions, and payment of pensions, and they shall be entitled to charge and receive for each oath so administered and certified, the sum of 10 cents.

H. B. No. 302 rearranges the sub-districts of the fifth common pleas judicial district making Franklin county a separate sub-division.

H. B. No. 161 redistricts the second judicial district.

H. B. No. 720 amends section 1504 as follows:

SEC. 1504. He shall, immediately after the township officers have made their annual settlement of accounts, make out and enter in the record in which the proceedings of the trustees are recorded, a detailed statement of all the receipts and the expenditures of the township for the preceding year, if any, and also the receipts and expenditures of the township board of education, stating from what source the moneys were received, and to

whom paid, and for what expended, and a detailed statement of all liabilities, if any, a copy of which statement he shall post up on the morning of the first Monday of April, annually, at each place of holding township election in such township. Any township clerk refusing or neglecting to make out, enter and publish said detailed statement, shall be liable to a fine of not more than thirty dollars nor less than twenty-five dollars, recoverable before any justice of the peace of the township, and to be paid into the school fund of the township.

H. B. 416 is an new act to authorize and regulate electric railroads, as follows:

SECTION 1. Be it enacted by the General Assembly of the State of Ohio, That companies incorporated under section 3237 of the Revised Statutes of Ohio for such purpose may construct, maintain and operate electric street railroads, or street railroads, or railroads using other than animal power as a motive power, for the transportation of passengers, packages, express matter, United States mail, baggages and freight upon the highways in this state outside of municipalities.

SECTION 2. All such companies shall have power to occupy and use for their tracks, cars and necessary fixtures and appliances, the streets, alleys and the public highways outside of cities and villages with the consent of the public authorities in charge of or controlling such streets and highways, and with the written consent of a majority, measured by the front foot, of the property holders abutting on each of such highways.

SECTION 3. When necessary to enter upon and use private property in the construction and operation of such roads, such companies shall have the same

power of appropriation that railroad companies have.

SECTION 4. Such companies shall have power to lease, purchase or make traffic arrangements with any other street railroad company as to so much of its tracks and other property as may be necessary or desirable to enable them to enter or pass through any city or village, upon the same terms and conditions applicable to other street railroads. And any existing street railroad company owning or operating a street railroad shall receive the cars, freight, packages or passengers of any other road, upon the same terms and conditions as they carry for the general public.

SECTION 5. Such street railroad companies may consolidate on the terms and conditions applicable to the consolidation of railroad companies: provided, however, no increase of fare shall be allowed on any street railroad route by reason of such consolidation.

SECTION 6. Such companies shall be subject to the same regulations now provided for street railroads, in so far as the same are applicable, and shall have all the powers, in so far as they are applicable, that other street railroad companies have.

H. B. No. 276 amends sections 1, 2, 4 and 10 of an act supplementary to chapter 1, title 6 of the Revised Statutes, as amended March 14, 1893, as follows:

S. C. 1. That in all cases where the commissioners of any county in this state shall cause to be constructed or enlarged, or cleaned out or repaired, any ditch, drain or water-course the water from which flows into an adjoining county, or into or finds an outlet in any ditch, drain or water-course constructed or being constructed in an adjoining

county, and in all cases where the commissioners of any county in this state shall cause to be constructed, enlarged, cleaned out or repaired any ditch, drain or water-course which is or may be an outlet for any ditch, drain, water-course of lands of an upper county, or which, by reason of any proposed improvement thereof, will provide better drainage or a more sufficient outlet for any ditch, drain, water-course or lands of an upper county, the commissioners of such upper county shall pay to the commissioners of such lower county such sum as may be agreed upon by the commissioners of both counties for the use and benefit of such outlet, which sum the commissioners of said upper county shall apportion to the lands in their county, for whose benefit said ditch was or is to be constructed, but before any work shall be begun in the construction, enlarging, cleaning out or repairing of any ditch, drain or water-course in either of said counties, the amount to be paid by the commissioners of the said upper county to the commissioners of the said lower county, for the use and benefit or burden of such outlet, shall be wholly agreed upon or determined; the sum which the commissioners of said upper county shall pay to the commissioners of said lower county, shall be determined at a joint meeting of the commissioners of said upper and lower counties upon the line of said ditch, drains or water-course, and the refusal of a majority of the board of commissioners of the said upper county to agree, or failure by them to meet, act or take part in a meeting with the commissioners of said lower county upon ten days' notice by the commissioners of said lower county upon the commissioners of said upper county, to determine what sum the commissioners of said upper county should

pay the commissioners of said lower county, shall be *prima facie* evidence of their failure to agree or pay, and ditches, drains or water-courses which provide drainage, or when constructed will provide drainage for land in more than one county, may be constructed, enlarged, cleaned out or repaired, as provided in this act and law prescribed for constructing, enlarging, cleaning out or repairing single county ditches, drains or water-courses.

Sec. 2. On failure to agree or pay as provided in the preceding section, the commissioners of such lower county may commence in the probate court of either of said counties, their action against the commissioners so refusing to agree or pay, setting forth the fact that proceedings have been begun for any such improvement, and the reasons why the commissioners of the upper county should pay to the commissioners of the lower county a compensation for such outlet or proposed outlet, and the failure to agree or pay as provided in the preceding section, and praying for the relief herein-after provided for. Said probate court before whom said action is commenced, shall, within ten days after the filing of a petition setting forth the above facts, issue a summons directed to the sheriff of the said upper county, who shall be commanded therein to notify the president of the board of commissioners of said upper county that an action has been commenced in accordance with section 2 of this act. Said summons shall contain a copy of the petition, the time and place of hearing, be served and returned as in other cases, and such service shall be not less than ten days before the day of hearing. Proceedings after service and return shall be the same as in other similar cases before probate courts.

Sec. 4. Either of the parties to said

action may, within ten days after the filing of said report, file exceptions thereto, which exceptions the court shall hear and determine, and shall confirm, modify or set aside said report, as justice may require; and if the same be set aside other freeholders shall be appointed, as provided in section 3 of said act; who shall estimate and report as provided in said section, and the decision of the court upon such report shall be final, unless the same shall be reversed upon proceedings in error for errors of law occurring upon such hearing, or because the determination of the court upon exceptions thereto is against the weight of the evidence.

Sec. 10. All proceedings for the construction, cleaning out, repairing or enlarging either of said ditches, in either the upper or lower counties, whether or not the same have been originally constructed as joint ditches, or whether or not the ditch to be constructed might be a joint ditch, may be commenced and conducted in the manner prescribed by this act and the law prescribed for single county ditches; but in addition to the manner of procedure prescribed in this act for the construction, enlarging, cleaning out or repairing of any ditch, which furnishes or may furnish drainage for more than one county, proceedings shall be commenced and conducted in the manner prescribed by law for the construction of joint ditches, whenever a majority of each board of commissioners of such counties shall so agree; but in all cases where such commissioners do not agree or determine to proceed under the laws for the construction of joint ditches, and the board of commissioners of said lower county unanimously agree that such improvement is necessary or will be conducive to the public health, conveni-

ence or welfare, and the line described in the best route, then all such proceedings in reference thereto, shall be conducted as provided by this act and the laws for single county ditches. Such proceedings to be conducted by the commissioners of said lower county:

S. B. No. 328 supplements 3,61 as follows:

Sec. 3961a. In case the board of education having control of the school in any joint sub-district shall fail or neglect to perform any of its duties as provided in section thirty-nine hundred and sixty-one; or if said board shall use or expend any part of the funds belonging to a joint sub-district for any other purpose than for the use of the schools of such joint sub-district; or shall fail or neglect at all times to keep the funds belonging to such joint sub-district in the treasury; the board of education of any township having territory in such joint sub-district may maintain an action in its own name, in any court having — jurisdiction, against the board of education having control of the school, to compel such board to perform its duty, or to restore to the treasury any funds which may have been unlawfully appropriated or taken therefrom; and such board, in addition to costs, shall be liable for all necessary expenses incurred in the prosecution of such action in the event of judgment being rendered against it. All actions under this section shall be commenced within six years from the time the right of action accrued; but such right of action shall not be deemed to have accrued until the discovery thereof.

H. B. No. 30 amends section 4026 as follows:

Sec. 4026. That each board of education may furnish the necessary school

books free of charge, to enable the parent or guardian, without expense therefor, to comply with the requirements of this chapter, the same to be paid for out of the contingent fund at the disposal of the board; and such levy each year, in addition if necessary to that otherwise authorized by law, is hereby authorized as shall be necessary to furnish such school books free of charge to all the pupils attending the public schools; but such pupils as are already wholly or in part supplied with necessary school books shall be supplied free of charge only as other or new books are needed; and all school books furnished as herein provided, shall be considered and be the property of the district, and loaned to the pupils on such terms and conditions as each such board may prescribe.

Sec. 2. That said section 4026 be and the same is hereby repealed.

Sec. 3. This act shall take effect one month after its passage.

S. B. No. 397 supplements sec. 2293, as follows:

Sec. 2293d. In villages of the first class, the council of such village shall have authority to cause any of the streets and alleys of said village to be improved by paving, macadamizing and curbing, or either of them, and the method of procedure in such case may be as provided in the Revised Statutes; provided, that the value of lots and lands for the purpose of assessment, may be ascertained and fixed by an appraisalment to be made by three disinterested resident freeholders appointed by the council, who shall, after being duly sworn, upon actual view of the premises, appraise the true value thereof in money. Such appraisalment shall include the value of all permanent improvements. The council may correct

any inequalities or errors in said appraisalment, or may order a new appraisalment. When confirmed by the council said appraised value shall be the basis for assessment for any such improvement, if the council so determine. The assessment shall not exceed twenty-five per centum of the value so fixed, and not more than one-fifteenth of the value so ascertained shall be collected in any one year. In such villages, a majority of the owners of the lots and lands to be assessed petitioning for such improvement, shall authorize the improvement and assessments to be made in all cases as provided in chapter four, division seven, title twelve of the Revised Statutes, subject to the modifications hereof.

S. B. No. 262 amends section 1371 as follows:

Sec. 1371. When it comes to the knowledge of the county auditor that the electors of any such township have failed to apply to the commissioners as aforesaid, for one year after such application is authorized, or in any such township the trustees and treasurer elected have failed to qualify or to perform the duties incumbent on them, the auditor shall appoint from among the electors of such township three trustees and one treasurer, who shall hold their offices for the same term and perform the same duties, and have the same powers as if elected as aforesaid. And in case the term of office of such trustees and treasurer have expired, and no successors have been elected or appointed, as by this chapter provided, an election may be ordered, as provided in section thirteen hundred and sixty-seven. In case such application is made, the commissioners of the county in which said reserved section, or part thereof, is substituted, shall order an election, desig-

nating the time and place of holding the same. They shall appoint three judges and two clerks to conduct such election, who shall give notice of the same by posting in some of the most public places within such township, written or printed notices thereof. Said election shall be conducted in the same manner as township elections in civil townships.

S. B. No. 406 amends section 3324 as follows:

Sec. 3324. A company or person having control or management of a railroad shall construct, or cause to be constructed, and maintain in good repair on each side of such road, along the line of the lands of the company owning or operating the same, a fence sufficient to turn stock; and when such fence is constructed out of barbed wire, or separate lateral strands not connected by interwoven wire, or cross perpendicular wire not more than fifteen inches apart, there shall be securely fastened to the posts, at the top of the same, at right angles thereto, at least one board, not less than one and one-eighth inches thick and five inches wide, and extending the entire length thereof; and before operating such road shall cause to be maintained at every point where any public road, street, lane or highway used by the public, crosses such railroad, safe and sufficient crossings, and on each side of such crossings cattle-guards sufficient to prevent domestic animals from going upon such railroad; and such company or person shall be liable for all damages sustained in person or property in any manner by reason of the want or insufficiency of any such fence, crossing or cattle-guard, or any neglect or carelessness in the construction thereof, or in keeping the same in repair. That provided, where any road now in process of construction, or any

proposed road, passes through any inclosed land, that the company or person having control of any such road shall, during the construction of the same, provide suitable crossings for the owner or occupant of each farm, and make and keep in repair fences along the line of such road through such inclosed fields, and protect any crop growing thereon; and further provided, that where the company or person agree, with the owner of the lands through which any railroad passes, that said owner shall build and keep in repair any portion of the fencing, and should said fencing be destroyed or damaged by fire from passing trains, said company or person owning or operating such road shall rebuild or repair said fence, provided the property holder should demand it; and provided, that if any railroad company shall fail or refuse to construct any fence in the manner hereinbefore provided, within six months after the passage of this act, and after having received written notice so to do from the owner or occupant of any lands through which the road may pass, (that) then said owner or occupant may, after thirty days from the time of serving such notice upon the agent of such company nearest said lands, proceed to construct the same, and the company shall be liable to such person for the cost thereof. This act shall apply to all fences now built, as well as those hereafter constructed.

S. B. No. 400 amends section 2680, as follows:

Sec. 2680. All fines and penalties which are assessed and collected by the police court for offenses and misdemeanors prosecuted in the name of the state, except a portion thereof equal to the compensation allowed by the county commissioners to the judges, clerk and prose-

cuting attorney of such court, in state cases, which shall be retained by the clerk, shall be paid by the clerk quarterly to the trustees of such law library associations mentioned in the next two preceding sections, except those in cities of the first grade of the first class, to be expended in the purchase of law books and the maintenance of such association; but the sums so paid shall not be less than five hundred dollars per annum, if there be such an amount. And all justices of the peace of such county, and all officers of townships, villages and cities therein shall have the same free use of the books of such library receiving such fines and penalties as the judges and county officers; and the trustees of such associations shall, on the first Monday of each year, make a detailed statement to the auditor of the county, verified by the oath of the treasurer of the association, of the amount of the fines and penalties so received, and of the money expended by the association. In cities of the first grade of the first class, all fines and penalties which are or have been assessed and collected by the police court for offenses prosecuted in the name of the state, shall be disposed of as directed by sections 1807 and 1812 of the Revised Statutes of Ohio, and the clerk of police court, in cities of the first grade of the first class, shall be relieved of all responsibility and liability for any such fines and penalties assessed and collected that have been or may be paid over to the county auditor as directed by sections 1807 and 1812 of the Revised Statutes of Ohio.

S. B. No. 45 repeals 5185, 5186, 5187 and 5188.

S. B. No. 2 provides for holding primary elections for the nomination of officers under the Australian system.

COLUMBUS CORRESPONDENCE.

COLUMBUS Ohio, May 22.—The case of William A. Gashe against Chas L. Young, George A. Miller, John S. Eck, John W. Hughes, John E. Potts and B. Ellis Bullock, error to the Circuit court of Lucas county was decided by the Supreme court to-day. The case has been in this court since September 18th, 1891. Messrs. Parks & Barber and Waite & Snider represented the plaintiff. H. S. Bunker represented the defendants.

The judgment of the Circuit court was reversed and a decree for the plaintiff in error rendered. The case will be reported.

Wm. A. Gashe, in his petition in the Common Pleas court, claimed that on May 1st, 1889, he recovered a judgment against Young and Miller, before Geo W. Merrill, a Justice of the Peace, for the sum of \$223.34 and costs for \$3.60. On May 3rd of the same year execution was issued to the sheriff of Lucas county, but was returned to him wholly unsatisfied. He further claimed that Young and Miller, with intent to defraud him out of said claim, conveyed property to the value of nearly \$100,000.00 to John S. Eck, John W. Hughes, J. F. Potts and B. Ellis Bullock. The defendants, Eck, Hughes & Potts set up in their answer that the property was purchased in good faith and deny that the conveyance was made for the purpose of defrauding the creditors. The Common Pleas court held that there was due Gashe from Young and Miller the sum of \$1840.19 as prayed for in the petition and amendment thereto. The court also held that there was due to numerous creditors sums prayed for in their cross-petitions. The case was appealed to the Circuit court and there the petition of Gashe and the cross-petitioners were dismissed with costs. Gashe brought the suit up to the Supreme court with the above result.

Sixth Judicial Circuit.

JUDGES.

Hon. C. S. Bentley, Bryan, O.
Hon. G. R. Haynes, Toledo, O.
Hon. C. H. Scribner, Toledo, O.

ASSAULT

With Intent to Commit a Rape. Degree of
Force Necessary to be Shown.

(Huron County Circuit Court. May Term.
Present: Hon. C. S. Bentley, P. J. C. H.
Scribner and G. R. Haynes, J. J.)

(In order to convict upon a charge of assault with intent to commit a rape the evidence for the State must show that the accused had a purpose to have sexual intercourse with the Prosecutrix and that he intended to use such force as might be necessary to overcome her resistance and accomplish his purpose.—ED. LEGAL NEWS.)

SCRIBNER, J.

At the October term 1893, of the court of common pleas of Huron County, one James Blannett was indicted by the grand jury of Huron County, and the charge was returned by the grand jury, for assaulting one Anna Patterson with intent to commit rape upon her person.

At the same October term of the court of common pleas, the accused was put upon his trial, and the jury returned a verdict finding him guilty of the offense for which he was indicted. A motion for a new trial was interposed, which was overruled and thereupon the court sentenced him to imprisonment in the penitentiary of the state for the term of 13 months.

This proceeding in error now under consideration, was brought in his behalf for the purpose of reversing the judgment of the court of common pleas, the court overruling the motion for a new trial and sentencing him for a term of imprisonment.

The transcript of the journal entry filed in the case, does not show, at least not the proper form and manner, that the accused had ever been indicted by the grand jury. The original indictment was filed in the case with the papers and made part of the record. The endorsement appears upon it, but the record simply sets out, after giving the title of

the case, that the Clerk does hereby certify that the following entries and judgment are truly copied from the journals of said court, to wit: "Oct. Term, to wit, November 20, 1893. This day came the prosecuting attorney on behalf of the State of Ohio and the defendant being brought into court, in custody of the sheriff and arraigned on said indictment, for plea thereto says he is not guilty, and puts himself upon the country, and the prosecuting attorney doth the like.

And it appearing that said defendant is in indigent circumstances, and unable to employ counsel, the court at his request, assigns F. H. Jones as counsel to defendant."

It should appear, as we understand the practice, by the journal entry, showing the proceedings of the court, that upon said day the grand jury returned an indictment endorsed as follows:—setting out the endorsement upon it. We have not, however, purposed to pass upon the sufficiency of the record in this regard, but proceed at once to the principal question which arises upon the record. I might add, however, that the bill of exceptions taken in the case and made part of the record shows this: "And this was all the evidence offered by either party in the cause."

"Thereupon the case was submitted to the jury by the court, and the jury having found in favor of the defendant, (instead of the plaintiff), the plaintiff, within three days after the verdict, made a motion for a new trial for reasons set forth therein, but the court overruled the same and rendered judgment upon the verdict to which judgment and verdict, or to which verdict and judgment and the overruling of the motion for a new trial the defendant then and there excepted and tenders this his bill of exceptions." Of course this was an inadvertence, escaping attention no doubt, before the signing of the bill of exceptions, but the journal entry, which must control in this matter, is entirely correct. It shows that the verdict of guilty was returned against the accused, not a verdict for the defendant, and it shows that the proceedings thereto

were by the defendant to set aside the verdict, and not by the state. I mention this matter merely by way of suggestion for counsel both for the State and the accused, as to the care that may be necessary in making up bills of exceptions.

The principal question arising in the case is one of fact. It is as to whether or not the verdict of the jury is sustained by sufficient evidence in this regard. The indictment, of course, charges the accused with having assaulted the prosecuting witness and with intent to commit a rape upon her person. The testimony fully warrants the verdict of the jury in so far as it may be held to find the accused guilty of the assault and even of an indecent assault upon the person of Mrs. Patterson. But the main, the principal and important question arising from the facts is as to whether or not the evidence warrants the verdict of the jury in finding that this assault was made with intent to commit a rape upon the person of the witness complaining, the prosecuting witness, Mrs. Patterson.

The prosecuting witness made this statement as to the facts connected with the transaction of which she complains: "On the evening of October 7th, last, I saw him. I first saw him (meaning the defendant), after I turned off from Main Street on to Milan Street. I again saw him just after I crossed the railroad track on Marshall Street. I had just got past a big tree below the track when I heard some running behind me. I turned out to let him pass, but he put his arm around me and grabbed my left arm and raised my dress. I struggled and pushed him away, and he looked at me an instant and pulled his cap down over his face and ran north and crossed Rule street. Some one was coming and I went on home. It was ten or fifteen minutes after six in the evening, old time. It was dark under the tree. There was good foliage on it."

Further on, she says in cross examination: "I had got just past the tree when he came up. When I crossed the railroad I saw a man sitting in the flag house. It is quite a little way from the track to the tree. After I came off from Main Street,

I met Blannett by the old black-smith shop on Milan Street, and I knew him when I passed him. I had seen him a great many times before. He came up behind me under the tree. He took hold of my arm and lifted my clothes as high as my knees. I pushed him away and said let me alone, go away and he ran off. That was about the way of it. He pulled his cap down and said "hump" and ran off. Nothing further was said or done."

She further said in regard to the transaction: "It was not more than a minute that he was scuffling under the tree. I got policeman Morrison up town. I knew this boy by the name of Nin Holmes. I said at Holmes' house, after I had talked with the boy, that I was mistaken."

There was some testimony tending to show that the woman was somewhat uncertain in her recollection as to the identity of the accused; the person who had assaulted her. The testimony indicates that she was at first disposed to charge another young man with the offense of seizing her; but the testimony of the woman is corroborated by that of other witnesses in the neighborhood, who testified that they saw the young man, Blannett, in that vicinity about the time that Mrs. Patterson was passing along, not very far distant from her, so that as far as the suggestion as to her being mistaken in the identity of the person is concerned, we think the jury were fully warranted in finding from the testimony that the accused was the party who had assaulted the complaining witness.

Now, this proposition stated in the brief of the counsel for the defendant below, the plaintiff in error here, we find upon full examination to be fully sustained and supported by the authorities as to the force and character of the evidence that is required to convict upon a charge of this kind.

The evidence, says the Supreme Court of Iowa, must show not only that the accused had a purpose to have sexual intercourse with the prosecutrix, but he must have intended also to use whatever degree of force might be necessary to over-

come her resistance, to accomplish his purpose. That is, the state must not only establish by proof to the extent required by the rule in criminal cases, the assault that was made by the accused, but also that it was made with the intent to use whatever degree of force might be necessary to overcome her resistance, to accomplish his purpose.

In the present case, the statement of the complaining witness is, as I have already read, that when the person who assaulted her came running behind her, "I turned out to let him pass, but he put his arms around me and grabbed my left arm and raised my dress. I struggled and pushed him away. He looked at me and instantly pulled his cap down over his face and ran north across Main street." He put his arm around her and grabbed her arm and raised her dress. In another place she said he raised her dress to her knees, or above it. He looked at her, pulled his cap down over his eyes and ran away. She says: "He came up behind me under the tree and took hold of my arm and lifted my clothes as high as my knees. I pushed him away and said, let me alone. Go away, and he ran off." That was all there was about it.

The question is, did the testimony of the State come up to the rule required in cases of this kind? Did the conduct of this young man at the time he committed the assault, at the time of inflicting this wrong upon this woman, did his conduct indicate that he intended to use whatever force might be necessary to overcome any resistance upon her part, to accomplish purpose, to have sexual intercourse with her on that occasion?

He made no further attempt other than what I have stated, he threw his arm around her and raised her dress to her knees. She said nothing to him; she bade him go away he left immediately without saying a word to her, except that he made some sort of an exclamation. He left her without any further disturbance.

Undoubtedly a case was made which would warrant the infliction of the full punishment of the law for making an in-

decent assault upon a woman upon the street in the night time, but it appears to us that the testimony falls far short of establishing that there was any purpose upon the part of the young man to use force, or oppose force to force, if she resisted him, in order to accomplish his purpose. When she bid him go away, he left; he didn't persist. He didn't attempt to compel submission to his wishes.

He made no effort other than what I have stated to overcome such resistance as she offered to his force.

Without dwelling upon the case further, it is sufficient to say that in our judgment, the verdict of the jury finding the young man guilty of an attempt to commit rape is not sustained by sufficient evidence and for that reason the judgment must be reversed and the verdict set aside and the case remanded for a new trial.

F. H. Jones for plaintiff in error.

J. R. McKnight, Prosecuting Attorney.

LIVERY BARN

Treated as Personal Property. Specific Agreement Necessary to Prevent it From Becoming Part and Parcel of the Realty.

(Wood County Circuit Court, April Term. Present—HON. C. S. Bentley, P.J.; C. H. Scribner and G. R. Haynes, J.J.)

203—B. F. Histe vs. John Buckley.

(Action brought for partition or sale of a livery barn, plaintiff claiming to own an undivided one-half interest in the property, and that he is excluded from participating in the rents or profits. Plaintiff did not aver that the barn was personal property, but all the title or interest he ever had in the property was acquired by a levy upon and a sale of one-half interest in the barn as the personal property of a man who, with defendant, built the barn. Held, that if it was intended by the original owners to be and remain of such a character, that some specific agreement to that effect would have been necessary to prevent its becoming part and parcel of the realty; that there was no testimony tending to show that it was intended or agreed that the barn should be removable from the land. Decree for defendant. —ED. LEGAL NEWS.)

BENTLEY, J. (Orally.)

This case comes into this Court on appeal, and was submitted to us upon the pleadings and evidence. The petition alleges in substance that the plaintiff, John Buckley, is the owner of the undivided one half of the livery barn situated

in lots Nos. 43 and 44 in the Village of Bloomdale. And that the defendant, Benjamin F. Histe, is the owner of the other undivided one half thereof; that the defendant, in violation of the plaintiff's rights, and against his consent, has assumed entire and exclusive control of said livery barn and is attempting to exclude plaintiff from all participation in rents and profits thereof, and that the sale of said barn is necessary for the protection of the plaintiff's interests therein. The prayer of the petition is that this barn may be partitioned between the two owners so that each may enjoy his half; or if that cannot be done without manifest injury, that the barn be sold or that such other order be entered as the justice and equity of the case require. The defendant files a general denial to this petition.

It will be observed that the petition does not aver directly that this livery barn is personal property. The plaintiff simply states that he is the owner of the undivided one half of the livery barn and that it stands on certain real estate. Upon the trial the plaintiff sought to make his title to the undivided one half of the property in this way: He claims that one Hosler and Mr. Buckley, in the year 1892, entered into a verbal agreement by which they were to jointly build this barn upon certain real estate that was then and now is owned by Mr. Buckley, and that in pursuance with that agreement, a barn was built at the joint expense of these two men; that afterwards, in 1893, a judgment was obtained against Mr. Hosler by a creditor of his, and his undivided interest in this barn was levied upon as if it were personal property, and, being offered for sale by the sheriff, was bid in by Mr. Histe who paid the amount of his bid, and thus became the owner of that undivided one half, as he claims, which had formerly belonged to Mr. Hosler. It will be seen that the whole claim of the plaintiff as to his having the title to that interest in the barn must rest upon the idea that it was personal property. He does not give any evidence tending to show that if it were to be regarded as real estate he acquired any interest in it.

The testimony as to certain matters was

conflicting. It was claimed upon the part of Mr. Buckley that while it was true that he and Mr. Hosler entered into an agreement to build this barn together, and while it was understood that each should contribute one half and have half, yet he claims that it was understood that a certain part of the real estate, then owned by him, should go as part of the livery barn property, and he was to be paid by Mr. Hosler for half the value of real estate. He claims that after the barn was finished, he having contributed to the expense, in a certain amount, and Hosler in a different and less amount, they came to talk about the price which Mr. Hosler should allow and pay for the half of the real estate involved, and he set a certain price that Mr. Hosler should pay, and that Mr. Hosler said that it was more than he dared undertake to pay for, and that he being at that time in debt to Mr. Buckley for other matters more than the amount that he had contributed in the building of the barn, it was then agreed between them that the whole barn partnership should be thrown up and the arrangement rescinded, Mr. Hosler retaining no interest in the barn, Mr. Buckley owning all of it.

Mr. Hosler was himself a witness and testified regarding the making of this agreement. His testimony and that of Mr. Buckley differ in this. Mr. Buckley having claimed, as I have said, that the understanding was that each was to contribute one half, Mr. Hosler testifies that his understanding was that he was to contribute what he could towards the building of the barn and should have such an interest in it as would be proportionate to the amount which he contributed to the whole. But he testifies that the said settlement was had.

The plaintiff gave evidence tending to show, however, that just before the levy upon this undivided half of the barn as the property of Mr. Hosler, he had a conversation with Mr. Buckley in which Mr. Buckley admitted and said that Mr. Hosler had an interest in one half of the barn and that he was not going to protect Hosler's property any longer. There was

also some testimony which the plaintiff claims indicates that Br. Buckley endeavored to conceal this property, although partly belonging to Mr. Hosler, from the creditors of Hosler.

Taking the testimony together we think the probabilities arising from the proof are that this settlement and agreement claimed by Mr. Buckley and Mr. Hosler actually did take place and that long before the levying of this execution under which Mr. Histe claims that Hosler had ceased to have any interest in the barn; Mr. Buckley had shortly after that rented it to another and always thereafter claimed to own it; had collected the rents, paid the taxes, and, in general, acted as a sole owner of the building would be expected to act; so that upon that proof we should find that the plaintiff should prevail. But there is perhaps even a more obvious objection to the plaintiff's case than that, and that is that the plaintiff's case resting entirely upon the idea that this was personal property (although he has not averred it,) he must prove that it was of that nature. He does not aver that it was, and the whole proof indicates that this barn was not to be regarded by the parties originally as personal property. It was a large building, a foundation wall of stone being put into the earth a foot or more and the barn placed upon it. Mr. Hosler worked upon the barn and, of course, knew how it was being built. It was of such a character that some specific agreement that it should be and remain personal property, would be requisite to prevent its becoming part and parcel of the realty. We conclude that whatever interest Hosler was to have and did have in it originally was an interest in real estate. There is no contradiction of this. There is no testimony even tending to show that it was intended or agreed that it should be removable from the land, and for these reasons the decree will be in favor of the defendant. The petition of the plaintiff is dismissed and he is adjudged to pay the costs.

Brown & Guernsey, for plaintiff.
S. P. Harrison, for defendant

The Federal Courts.

A sufficient number of the jurors for the June term of the U. S. Court, Northern District, have signified their intention to serve and wait for their fees to make trial of jury cases possible. The following is the assignment for the June term.

LAW CASES.—CASES FOR TRIAL BY JURY.

All the cases on the Law Docket of the Circuit Court will be called on Tuesday, June 5th, 1894, at 9:30 a. m., and cases will be tried under the following assignment:

Tuesday, June, 5th.

- 499 Portsmouth Savings Bank vs Union Township.
- 525 Potter vs Blue Creek Township.
- 941 Portsmouth Savings Bank vs Union Township.
- 945 Ohio Coal Exchange vs Ozias W. Shipman.
- 958 Knickle vs L. E. & W. R. R. Co.
- 962 Knapp vs L. E. & W. R. R. Co.
- 966 Osterholt, admx. vs B. & O. R. R. Co.
- 1006 Goodyear's Indian Rubber Glove Mfg. Co. vs Franklin Hubbard.
- 1013 Vogel, executrix, vs B. & O. R. R. Co.
- 1016 McPherson vs N. Y. L. E. & W. R. Co.
- 1066 Stuter vs L. E. & W. Ry. Co.
- 1068 Flanders vs B. & O. R. R. Co.

Wednesday, June 6th.

- 1069 Raymond, Admx., vs B. & O. R. R.
- 1070 Albaugh vs same.
- 1071 Joy vs same.
- 1072 Harvey vs same.
- 1082 Hays, Receiver, vs W. R. Mehaffy, et al.
- 1092 Western Carolina Bank vs W. H. Young.
- 1100 Applegate vs Penna. Co.
- 1109 Mulcahey vs L. E. & W. Ry. Co.
- 1113 McPherson vs The N. Y., L. E. & W. Ry Co.
- 1114 Benson vs Baltimore & Ohio R. Co.
- 1117 Hackett's Admr. vs same
- 1118 Theophile Mal's Admr. vs same
- 1121 Deter, Admr. vs. same

Thursday, June 7th.

- 1127 H. J. Smith vs. The Chicago & Erie R. R. Co.

1133 The Sterling Co. vs The Buckeye Brewing Co.

1137 H. H. Brundage vs David Dardorff, et al.

1142 W. I. Green vs City of Toledo.

1144 Schulenberg, Admr. vs Marvin R. Dyer.

Friday, June 8th.

1158 City of Toledo vs Geo. N. Barwell, et al.

1159 Julia Crowe, Admx. vs Mich. Cent'l R. R. Co.

1163 Frank B. Craig vs L. E. & W. R'y. Co.

1164 George Seibel vs The B. & Ohio R. R. Co.

1168 Cornell University vs Village of Maumee.

1170 Cora Smith, Admx, vs The Pennsylvania Co

Saturday, June 9th.

1171 Francis Burt vs The Pennsylvania Co.

1172 S. S. Laugabaugh et al. vs Samuel A. Baxter.

1178 S. W. Van Pelt vs Alfred F. Stowe, Admr.

Monday, June 11th.

1187 E. M. Dunlap vs The Thomson-Houston Carbon Co

1191 Thos. Donovan vs the Pennsylvania R. R. Co.

1192 Schmidt, et al, vs City of Defiance.

1195 Edward C. Keys vs Francis Lannoy.

1197 Wolf, Admr., vs L. E. & W. Ry. Co.

1199 F. O. Staats vs B. & O. R. R. Co.

1200 M. Casserly vs B. & O. R. R. Co.

Tuesday, June 12th.

1203 John Gritcha vs Elija B. Hall.

1204 Wm. C. Niblack, Recr., vs The Farmers Bank of Conway.

1209 Timothy McCarthy vs Penna. Co.

1210 John Voght vs Penna. Co.

1213 Charles W. Burdick vs L. S. & M. S. Ry. Co.

1217 Chas. Repke vs Penna. Co.

1222 John J. McDonald, et al., Thaddeus S. Gilliland.

1223 Thos. H. McDonald vs The Toledo Con. St. Ry. Co., et al.

1226 Anney A. Andrews, et al., vs The Provident Fund Society.

1229 Franziska Gawlack, Admx., vs The Michigan Central Ry. Co.

Supreme Court.

SUPREME COURT PROCEEDINGS.

TUESDAY, MAY 15 1894

General Docket.

2186—The Richland County Mut. Ins. Co. vs the Board of Trustees of Oberlin College. Error to the Circuit Court of Cuyahoga County, judgment affirmed.

2437—George Willard ex'r vs The First National Bank of Ironton. Error to the Circuit Court of Lawrence County, judgment affirmed.

2801—David Spaulding vs The National Exchange Bank of Steubenville. Error to the Circuit Court of Jefferson County, judgment affirmed.

2823—Maria G. Allen vs Josephine Baldwin. Error to the Circuit Court of Clark County, judgment affirmed.

2831—Isaac Selby vs Harriet Taylor. Error to the Circuit Court of Morrow County, judgment affirmed.

2854—William P. Smith admr vs Allen Knisley. Error to the Circuit Court of Ross County, judgment reversed and appeal dismissed.

2869—Aminda C. Carver vs Carlton F. Humphrey. Error to the Circuit Court of Franklin County, judgment affirmed.

3710—The Lake Shore & Michigan Southern Ry. Co. vs the State of Ohio ex rel Russell C. Humphrey. Error to the Circuit Court of Cuyahoga County, judgment affirmed.

Motion Docket.

2168—Lewis H. Mason vs J. C. Hull, assignee etc, et al. Motion by defendants for additional printed record in cause No. 3930, on the general docket, motion allowed.

2169—Henry Kramer vs The Toledo & Ohio Central Railway Company. Motion by defendant for printing additional record in cause No. 3060, on the general docket, motion allowed.

2170—Trustees of the Cincinnati Southern Railway vs David Banning. Motion by plaintiff to re-instate cause No. 2878, on the general docket, motion allowed by consent of parties.

SUPREME COURT NEWS.

COLUMBUS Ohio, May 14—The following cases were filed in the Supreme Court last week:

4022—D. M. Osborne & Co vs Thos J. Egan. Error to the Circuit Court of Licking County. Kibler & Kibler, Newark, for plaintiffs; Waldo Taylor, Newark, for defendant.

4023—The Goheen Manufacturing Co vs Julius Frank et al. Error to the Circuit Court of Stark County. Day, Lynch & Day, Canton, for plaintiff; Granger & Granger, Zanesville, for defendants.

4024—The Celina Colored Plate & Window Glass Co vs The Celina Light & Fuel Co. Error to the Circuit Court of Mercer County. Selwyn N. Owen, Columbus, and John Poe, Findlay, for plaintiff; Armstrong & Johnson, Celina, for defendant.

4025—Humphrey Jones vs Chauncey Holland. Error to the Circuit Court of Fayette County. Hidy & Patton, Washington C. H., for plaintiff; J. J. Harper, Washington C. H., for defendant.

Jacob Haberty vs the State of Ohio Motion for leave to file a petition in error to the Circuit Court of Hamilton County. Arthur Espy and Walter A. DeCamp, Cincinnati, for plaintiff; John C. Schwartz Cincinnati, and Attorney-General, for defendant.

4026—William Dougherty vs The Wheeling & Lake Erie Ry Co. Error to the Circuit Court of Jefferson County. J. W. Jordan and J. F. Daton, Steubenville, for plaintiff; John M. Cook, R. G. Richards, Steubenville, for defendant.

4027—Isaac Graveson vs The Cincinnati Life Association. Error to the Circuit Court of Hamilton County. Stephens Lincoln & Smith for plaintiff; Harmon, Colston, Goldsmith & Hoadly, for defendant. All of Cincinnati.

4028—Absolom Foulk vs Jonathan Boucher. Error to the Circuit Court of Putnam County. A. V. Watts and J. Werner, Ottawa, for plaintiff.

4029—Same vs Anna Boucher et al. Error to the Circuit Court of Putnam County. Same attys for plaintiff.

4030—Jas Ross, sheriff, and Delila

Worthington vs Elizabeth Carter and Andrew Carter. Error to the Circuit Court of Franklin County. L. J. Critchfield, for plaintiffs; Edmond B. Dillon, for defendant. All of Columbus.

4031 Neri Ebersole vs Augustus Krabill, admr etc. Error to the Circuit Court of Hancock County. Jason Blackford, Byal & J. V. Jones, Findlay, for plaintiff; A. Blackford and A. J. Stackhouse for defendant.

4032—Welhelmina Traucht vs William C. Watson. Error to the Circuit Court of Hancock County. Jason Blackford & Byal, Findlay, for plaintiff; W. W. Shuler & A. Blackford for defendant.

MAY 21, 1894.

The following cases were filed in the Supreme court last week:

4033—Henry Klostermeier vs the city of Marietta, Ohio, et al. Error to the Circuit court of Washington county. Samuel S. Knowles, Marietta for plaintiff; J. C. Brennan, for defendants.

4034—Ira Cadwallader, executor, etc. vs. Jacob Schumacher. Error to the Circuit court of Seneca. Brewer & Brewer and N. W. Miller, Tiffin, for plaintiff; Noble, Keppel & Noble, Tiffin, for defendant.

4035—The Mahoning Gas Fuel Co. vs Fayette Brown, receiver of Brown, Bonnell & Co. Error to the Circuit court of Mahoning county. T. W. Sanderson and M. A. Norris, Youngstown, F. C. Reed, Beaver, Pa. and M. F. Elliott, Oil City, Pa., for plaintiff; Hine & Clark, Youngstown, for defendant.

4036—The state of Ohio ex rel McCartney vs J. W. Prendergast, Health Officer of Cincinnati, etc. Error, to the Circuit court of Hamilton county. Jas. D. Ermonston and Wright & Wright, Cincinnati, for plaintiff; F. Hertenstein, Corporation Counsel, and J. C. Hart, Cincinnati, for defendant.

4037—The Columbian Printing Co. vs The Louis Snider's Sons' Co. Error to the Circuit court of Franklin county. Luke G. Byrne and C. R. Gilmore, Columbus, for plaintiff.

Toledo Legal News.

OFFICIAL LAW JOURNAL OF LUCAS
COUNTY, OHIO.

In the matter of the designation of a daily law Journal in Lucas County. As required by Sec. 1 of an Act passed April 14th, 1884 and amended Feb'y 25, 1895, entitled "An Act relating to the posting of court calendars and legal notices in certain counties," as amended May 9, 1894, the Judges of the Courts of Record in said County other than the Circuit Court, hereby jointly designate the TOLEDO LEGAL NEWS, a daily law journal published in said County, as the journal wherein until the further order of said judges, shall be published all the notices, advertisements, abstracts and matters and things specified or referred to in said Section 1.

Approved { GILBERT HARMON,
REUBEN C. LEMMON,
ISAAC P. PUGSLEY,
Judges of Common Pleas.
I. I. MILLARD, Probate Judge.

Weekly edition, \$3.00 Per Year, payable quarterly in advance. On trial for three months, 75c.
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C. G. WILKINSON, Business Manager.

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SATURDAY, JUNE 2, 1894.

DEATH OF JOSEPH D. FORD.

One of Toledo's ablest lawyers, and most respected citizens, Joseph D. Ford, died very suddenly at the St. Nicholas Hotel in Cincinnati yesterday morning. His death was due, it is thought, to heart disease and to his brother lawyers in Toledo, to the whole City in fact, the news comes as a terrible shock, for very few people had any idea that Mr. Ford was in anything but the best of health.

On Decoration day Mr. Ford, in company with Judge J. W. Cummings, left for Cincinnati on legal business. While there, even on the evening previous to his death, he appeared to be in excellent health. In the morning, when the hour came at which the case in which the attorneys were engaged in tak-

ing depositions had arrived and Mr. Ford did not come down, Judge Cummings went to his room; getting no response the porter was called and the door opened. Mr. Ford, the talented, genial lawyer, in the prime of life and approaching the zenith of his merited success, was dead, had been dead apparently about two hours.

The deceased was a son of Daniel B. Ford and was born in Huron county in June, 1841. He was educated in the schools of Ohio and New Hampshire, Normal school of Minnesota and at the University of Michigan. After leaving college he entered the law office of Baker & Collins, Toledo, and became a member of the Ohio Bar in 1867. Since in 1875 he had been associated with Hon. J. Kent Hamilton, under the firm name of Hamilton & Ford, one of the most successful law firms in Toledo.

Mr. Ford was a man of excellent, unusual legal attainments, generally speaking, and occupied a prominent position in the front rank of criminal lawyers of Ohio. To his ability was added strict integrity and the kind, genial disposition which causes widespread sorrow, and in all walks of life, at the news of his death.

Mr. Ford leaves a daughter, Miss Blanche Ford, a brother, Daniel E. Ford, of Oregon township; a sister, Mrs. A. M. Austin, of Rockland, Me., and a cousin, Miss Ella Ford.

The Lucas County Bar Association will meet this afternoon at 4 o'clock to adopt suitable resolutions of sorrow and respect for a honored member.

IT IS PERMANENT.

It will be gratifying to those who have taken such a prompt interest in our enterprise to learn that the weekly edition of our paper is receiving very flattering support throughout the state: that its success has already placed it beyond the line which marks an experimental character. Wherever our representative has been the result has uniformly been, hearty and substantial support.

With this number we begin an introduction of the paper in Counties other than those where the first numbers have been sent. In doing so we should, perhaps, state that while we have not disfigured the pamphlet by marking it "sample copy," it is to be so regarded and, no matter how many issues may be sent, there will be no attempt to charge or collect except from those who contract for the paper.

We cannot immediately canvass the whole territory and from the new field we should be very glad to receive, as we did from the first, subscriptions by mail. We continue to offer to send the paper on trial for three months for seventy-five cents.

IMPORTANT DECISIONS.

This number of the *LEGAL NEWS* is devoted very largely to the 6th Judicial Circuit Court decisions. All are important, but one, rendered at the January term in Lucas county; if of special interest and will be valuable to attorneys throughout the state.

The case referred to, *Toledo Elec-*

tric Street Railway Co. vs Western Electric Light and Power Co. et al. involves the construction of laws relating to electric light companies and the joint use of poles erected in public streets.

HE WAS NEAR SIGHTED.

A lawyer's conclusions were the subject of an amusing argument in Common Pleas Court on Thursday, in a case tried to a jury in Judge Harmon's room. The suit was brought to recover damages for an alleged slander which consisted, the plaintiff charged and proved, in accusing him, a street car conductor, with having collected fares which he never "rang up" and never turned over to the company.

The defense attempted justification on the ground of truth and secured several witnesses, who testified that the plaintiff had taken their fares and failed to "ring them up." One of these witnesses, it was developed on cross examination, was *near sighted*. Commenting upon his testimony the erudite young attorney for the plaintiff said "Mr. — says the conductor took his fare and did not ring it up! But how could he tell? He is *near sighted*!"

The jurors evidently figured it out that defective eyesight might not necessarily prevent the witness from hearing a bell ring for they found a verdict for the defendant.

MISCELLANEOUS.

Colonel Breckinridge has two sons—one a lawyer, Desha; the other, named for his grandfather,

Robert J. Breckinridge, is of a wild disposition. Just before the breaking out of the Breckinridge-Pollard scandal, Bob got on a spree and had had several fights. Colonel Breckinridge telegraphed from Washington to put him in jail and keep him there until he returned, which instructions were followed. It was decided to send Bob on a sea voyage, and just as he was boarding a vessel, he read an account of his father's doings with Miss Pollard, and wired his brother: "Put the old man in jail, and keep him until I return, three years hence."—*Sunday Courier, Toledo.*

We clip the following legal curio from "The Kansas Breeze." Let the people read, and cease their criticism on the lack of progress in the law: "Following is a section of law in 1770, when the territory of these United States was governed by his majesty the King of England: 'Any person who shall, by means of rouge, or of blanc, of perfumes, of essences, of artificial teeth, of false hair, or cotton espagnol, of steel stays or of hoops; of high heeled shoes, or of false hips, entice any of his majesty's male subjects into marriage shall be prosecuted for sorcery and the marriage shall be declared void.'"—*The Mirror.*

PRIOR USE.—A patentee recently protected a small domestic appliance. Sometime afterward a too enterprising antiquary ransacking the tombs of Egypt turned up a similar appliance, which he considers to have been in use three

thousand years ago. This discovery, in the opinion of an expert, vitiates the letters patent recently granted, inasmuch as the invention for which protection was therein granted was not new and original.—*Law Gazette.*

TRIAL BY JURY.

Right of in Forcible Entry and Detainer Cases.

(Hamilton Co. Common Pleas).

Miller vs Schmidt. Error to record of Justice of the Peace in Forcible Entry and Detainer.

(Section 6607 R. S., construed with secs. 6608 and 6517 R. S., does not in forcible entry and detainer, limit the right of trial by jury to a demand either on return or appearance day.—*Ed. LEGAL NEWS.*)

BUCHWALTER, J.

The plaintiff in error, Miller, was summoned May 11, 1894, by the Constable on a summons returnable May 15, 1894, and naming therein 9 o'clock a. m., May 15, 1894, as the appearance day and hour.

On appearance day the cause was continued until May 16 at 1 o'clock p. m., when the parties appeared in court and Miller demanded trial by jury, which the Justice refused; therefore the justice proceeded to hear without a jury, and gave judgment of restitution of the premises in favor of Louisa Schmidt and against Miller, to all of which Miller excepted, and presents his complaint by a bill of exceptions.

Section 6607 provides that "if the suit be not continued, place of trial changed, or neither party demand a jury upon the return day of the summons, the Justice shall try the cause." * * * This section is found under Chap. 9, under title, "Forcible entry and detainer."

Section 6608 provides "If a jury

be demanded by either party, the proceedings until the impanneling thereof shall be in all respects as in other cases." * * *

Section 6547, Chap. 6, "Trial and its incidents," provides: "In all civil actions after the appearance of the defendant and before the court shall proceed to inquire into the merits of the cause, either party may demand a jury to try the action." * * *

It was held in 39 O. S., 534 Bonham vs Mills, that the demand for a jury made on the appearance day, (to wit, April 9, 1879), although one day subsequent to the return day, (to wit, April 8, 1879), was good, and in the opinion by the court it is stated that the opinion of Doyle, J., in Hill vs Hollister, 5 W. L. Bull., 757. (Lucas Common Pleas Court,) is in accordance with this view (Judge Doyle being a member of the Supreme Court announcing the opinion as above).

It will be observed that the case at bar does not come within the statement of facts set forth in Bonham vs Mills, but it is fully within the facts in Hill vs Hollister. In that case the cause was twice continued for trial, and on the final trial day the defendant demanded a jury, but was refused, which judgment of the Justice was reversed for this error. The history of legislation in this state is forcible entry and detainer is therein fully set out, which need not here be repeated, but from it all the inference is made, that section 6607, constructed with 6608 and 6547, does not in forcible entry and detainer limit the right of a trial by jury to demand on either return or appearance day, that the Legislature did not mean to confer jurisdiction

on the Justice to try such cases unless a jury were demanded any time before trial, as in civil actions generally, and did not intend to discriminate against this class of cases as to the right of trial by jury.

I know of no other reported ruling in construction of section 6607, nor of any local ruling in our practice in these courts, and, therefore, deem it proper to conform to the construction adopted in Hill vs Hollister, 5 Bull., 757.

Shay & Cogan, attorneys for plaintiff.—Court Index.

U. S. District Court.

IN ADMIRALTY.

169—James M. Ely et al vs the Str Shrewsbury, motion of The Buffalo Loan & Tr Co to set aside default. Swayne, Swayne & Hayes, Proctors.

171—S. R. Callaway, recr. vs Orient Ins Co. Answer of libellant to interrogatories propounded by respondent. Brown & Geddes, Proctors.

U. S. Circuit Court

1130—The Genesee Salt Co vs Hiram Burnap et al. motion for order requiring complt to give security for costs. J. F. Kunkler, solr.

1178—Saml W. Van Pelt vs Alfred F. Stone, admr; deposition on behalf deft.

1209—Timothy McCarty vs The Penn Co; reply; Harvy Scribner, atty.

1058—Daniel M. Kennedy vs Solar Refg Co et al; stipulation for continuance of hearing.

1058—Same vs Same; affidavit and certificate.

1082—O. L. Hays, recr, vs W. R. Mehaffey and O. B. Selfridge Jr. Stipulation for continuance December term 94.

1165—David J. Hill vs Jno S. Greener; praecipe for order of sale; Harris & Cameron, Solrs.

1205—Farmers L. & T. Co. vs The T. A. A. & N. M. Ry. Co. On intervening petn of Ida B. Beaulien, admr; stipulation for costs. Bissell & Gorrill and Justice & Lairy, attys.

1205—Same vs Same; reply.

1218—Leavens et al vs Chas E. Bronson et al; motion to appoint recr to take charge of property; Parks & Parks, Solrs.

1111 Benson Bidwell et al vs The Toledo Consolidated St Ry Co; motion to fix time within which the deft and complt shall complete the taking of testimony in

answer and rebuttal: Hurd & Brumback, attys.

1112—Same vs Same; same motion and same attys.

1178—Van Pelt vs Stowe, admr; motion to suppress def't's depositions; Geo. P. Vorhees, atty.

1182—Farmers L. & T. Co. vs T. A. A. & N. M. Ry Co; order directing and instructing receiver that he is not required to defend certain suits against the company. (The order was entered on telegraphic advice and does not indicate what suits are referred to; the application on which it was made has not been filed here; it is presumed however that the order has reference to suits of the Ashleys, including the one recently brought by Ex. Gov. Ashley for about \$400,000.)

1230—Krutz vs Long. Damages for breach of contract concerning real estate and store property at Florida, Defiance Co. W. H. Hubbard, atty, Defiance, O.

Additional Grand Jurors.

The following additional grand jurors have been drawn for the June term. P. H. Dowling, Jos H. Ainsworth, Henry W. Bigelow, Austin Bishop, Adam Smith and Elias Facett, all of Toledo.

Supreme Court.

SUPREME COURT PROCEEDINGS.

Causes to and including No. 2960 are called and submitted; the next call will be to and including No. 3075.

TUESDAY, MAY 22 1894.

General Docket.

4003.—Jones vs the State. Error to the Circuit Court of Brown County.

BRADBURY, O.

1. When the venue in a criminal cause has been changed, the Court of Common Pleas, sitting in the county to which the cause has been removed for trial, is authorized by sections 7264 and 7283, Revised Statutes, to send the jury, in a body, to the county in which the crime was committed and the indictment found, to view the *locus criminis*.

2. Where, upon such view, counsel for the accused, and the prosecuting attorney, in the presence of the jury, caused measurements to be made, objects to be placed as near as possible in the relative positions they respectively occupied when the alleged crime was committed, and made experiments illustrative of the manner in which it may have been done, the accused being present, in the court

pany of, and at liberty to communicate freely with, his counsel, indicates no objection to, or dissatisfaction with, such proceedings, should be deemed to have authorized the same; and a motion made in his behalf, on the return of the jury into court, for its discharge, on account of such proceedings, was properly overruled.

3. Where a father, placed upon trial for killing his son, a youth of about sixteen years, contended that the boy had left home to associate with immoral women, with whom he was being criminally intimate, and that the homicide was accidentally committed while the father was attempting to reclaim his son, evidence of the character of such women, is competent, as reflecting upon the motives of the father in seeking his son.

4. An intention to kill is an essential element of the crime of murder in this state, and must be established beyond a reasonable doubt, to authorize a verdict of murder in the first or second degree. This rule is not changed by the reason of the accused contending, and introducing evidence tending to prove, that the homicide was accidental. The legal effect of such evidence being, simply, to controvert an inference of an intent to kill, which may arise from the evidence introduced by the state.

Judgment reversed and cause remanded for further proceedings.

3607—R. J. Dailey et al vs the State of Ohio. Error to the Circuit Court of Portage County.

SPEAR, J.

1. An owner of land adjoining a public highway whose title extends to the center of the road, who has cultivated shade trees, planted partly on his own land and partly in the line of the highway within the bounds of his deed, has a property interest in such trees, and the right to their enjoyment subject only to the convenience of public travel.

2. The legislature may authorize the construction of a telegraph line by a telegraph company upon a public highway, in such manner as not to inconvenience the public in the use of such highway, but authority so given does not empower such company to injure the property of an adjoining land owner, nor to appropriate any of his property rights in the highway except upon the condition that compensation be first made. Nor is warrant given to injure such property, nor to appropriate such property rights without compensation, by the act of congress of July 24, 1866, known as section 5263, *et seq.*, of the Revised Statutes of the United States.

3. The property right of such owner

in trees thus cultivated by him, is a proper subject of legislation for its protection. And one who, having knowledge of the rights of such land owner in the trees, proceeds, against the protest of such owner, heedlessly, recklessly and carelessly to injure them, may be prosecuted under section 6880, of the Revised Statutes, for a wrongful injury to property.

4 The simple fact that the land owner did not, at the time the telegraph line was built, although aware of the purpose to build, object and prevent its construction by injunction proceedings, will not estop him, after the expiration of ten years from the date of such construction, from asserting his property interest in the highway and in the trees growing upon and in front of his premises.

Judgment affirmed.

3812. W. S. Groesbeck vs The City of Cincinnati and D. W. Brown, City Auditor. Error to the General Term of the Superior Court of Cincinnati.

BURKETT J.

An ordinance of a city assessing on the property abutting on a street more than is required to pay the cost of the improvement of the street, is, as to the excess of the assessment over the cost of the improvement, illegal; and, having been paid by the property owner, an action to recover back such excess, under section 5848, Revised Statutes, must be commenced within one year after such payment. The fact that the passage of the ordinance was induced by a mistake in the calculation of the cost of the improvement, and that payment was made in ignorance of such mistake, will not have the effect to save the action from the limitation provided for in said section.

Judgment affirmed.

No. 2885. William A. Gashe vs Charles L. Young et al. Error to the Circuit Court of Lucas county.

WILLIAMS, J.

1. An agent who acquires property for a consideration furnished by his principal, and takes the title in his own name, holds it as trustee for the principal; and in general, when the title to property purchased is taken to one or more persons, and the consideration, or an aliquot part thereof, is paid by another, a trust results in favor of the latter.

2. When a debtor executes a conveyance of his real estate, or assignment of his personal property to certain of his creditors and the agent of another jointly, in consideration that his indebtedness to those creditors shall be cancelled, a trust arises in favor of the creditor to whose

agent the conveyance or assignment is made; and when it is so made, in contemplation of insolvency, and with the intent to prefer such creditors to the exclusion of others, it constitutes an assignment in trust to trustees, within the purview of section 6343 of Revised Statutes, and by virtue of that section insures to the equal benefit of all the creditors, in proportion to the amount of their respective claims.

Judgment reversed, and judgment for the plaintiff.

3829. The City of Findlay vs Priscilla B. Frey. Error to the Circuit Court of Hancock County.

MINSHALL, J.

1. Under section 2270, Revised Statutes, the value of the lot or land, with the improvements, as assessed for taxation, is to be taken in determining the limit to which it may be assessed for the improvement of a street on which it abuts, whether made by the foot front or otherwise.

2. Sec. 2269, Revised Statutes, applies to an assessment by the front foot, only, where land, bounding or abutting on the improvement is not sub-divided into lots; and its object is, not to fix the depth of lots for the purpose of varying the amount of the assessment, but a depth beyond which its lien, cannot, in such cases, attach.

3. Where a street is of different widths, it may, in a proceeding to improve it, be divided into as many sections as there are different widths; and the property on each section assessed for the costs of the same.

Judgment reversed, and petition dismissed as to the assessment for the improvement of Main street; and cause remanded for further proceedings as to that for the improvement of Sandusky street.

No. 2383. J. B. F. Pride et al, vs Geo. Andrew et al. Error to the Circuit Court of Washington county.

DICKMAN, C. J.

Where an owner, during the pendency of a suit against him, and in view of a possible judgment being rendered therein adversely to him, conveys his property to another with intent to defeat the satisfaction of such judgment as may be recovered against him in the suit, he cannot, after judgment in such suit in his favor, have the aid of the court of equity to compel the grantee to reconvey to him the property.

Judgment affirmed.

2351 The Springfield Fire & Marine Ins. Co. vs Julia H. Hull. Error to the Circuit court of Mahoning county. Judgment affirmed. Reported.

2393. Chauncey H. Andrews vs Wil-

liam Watson. Error to the Circuit court of Mahoning county. Judgment affirmed.

2841. The Methodist Episcopal Church of Jefferson, Ohio vs Sophronia Wolcott. Error to the Circuit court of Ashtabula county. Judgment affirmed.

2863 Adah S. Bulen et al vs Evan Moses et al. Error to the Circuit court of Franklin county. Judgment affirmed.

2879. Henry J. McKirnan, Treas, vs Jacob Counterman et al. Error to the Circuit court of Mercer county. Judgment affirmed. MINSHALL J., dissents.

2883. Lucy E. Eaton et al vs The Home Life Ins. Co et al. Error to the Circuit court of Hamilton county. Judgment affirmed.

Motion Docket.

2172. Thomas Kindall et al vs John A. Nash admr. Motion by plaintiffs for extension of time to December 1, 1894, to file printed briefs in cause No. 3039, on the General Docket. Motion allowed.

2173. The Citizens Electric Ry Light & Power Co vs Samuel McMullen. Motion by defendant to advance cause No. 3994, on the General Docket. Motion allowed.

2174. The Goheen Manufacturing Co vs Julius Frank et al. Motion by plaintiff to advance cause No. 4023, on the General Docket. Motion overruled.

2175. John H. Sharp vs William H. Smith et al. Motion by plaintiff to dispense with printing bill of exceptions in cause No. 3969, on the General Docket. Motion overruled.

2176. The Mahoning Gas Fuel Co vs Fayette Brown, Receiver. Motion by plaintiff to extend time to file printed record in cause No. 4035, on the General Docket. Motion allowed. Time extended to December 1, 1894, in which to file printed record.

2177. Walter C. Tisdell, Auditor etc et al vs Samuel Wire. Motion by plaintiff to re-in-state cause No. 2847, on the General Docket. Motion allowed.

SUPREME COURT NEWS.

COLUMBUS, O., May 26—The Supreme Court adjourned last Friday until Tuesday June 5th, on account of Memorial Day. The following causes were filed last week:

4038—Wallace Burch et al vs City of Cincinnati et al. Error to Circuit court of Hamilton county. Burch & Johnson, Cincinnati, for plaintiffs; Corporation Counsel and J. C. Hart, Cincinnati, for defendants.

4039—Lynn Ranney vs S. O. Edison.

Error to the Circuit court of Lorain county. A. R. Webber, Elyria, and Estep, Dickey, Carr & Goff, Cleveland, for plaintiff; P. H. Boynton, Elyria, for defendant.

4040—The Western Electric Light & Power Co. vs The Toledo Electric Street Railway Co., The Toledo Electric Co. and The Toledo Consolidated Street Railway Co. Error to the Circuit court of Lucas county. King & Tracy, Toledo, for plaintiff; Doyle, Scott & Lewis, Hurd, Brumback & That her and Baker, Smith & Baker, Toledo, for defendants.

4041—D. F. Ramsey vs Ulrick, Bell & Co. Error to the Circuit court of Franklin county. J. V. Lee & W. B. Page, Columbus, for plaintiff; J. W. Mooney, Columbus, for defendants.

4042—Joseph Ralston vs John Wells Error to the Circuit court of Defiance county. Henry Newbegin, Defiance, for plaintiff; Harris & Cameron, Defiance, for defendant.

4043—The State of Ohio ex rel, Emerson E. White et al vs William Howard Neff et al. Error to the Circuit court of Hamilton county. J. B. Foraker, Wilby & Wald and Mathews & Cleveland, Cincinnati, for plaintiffs; E. W. Kittredge, J. W. Warrington and Follett & Kelley, Cincinnati, for defendants.

4044—Edgar M. G. Noe and Ophia N. Noe vs Ayers W. Powers. Error to the Circuit court of Hamilton county. L. H. Pummill, Cincinnati, for plaintiffs; A. J. Cunningham, Cincinnati, for defendant.

4045—The Baltimore & Ohio Ry Co et al vs City of Tiffin. Error to the Circuit court of Seneca county. J. H. Collins, Columbus, for plaintiffs; P. H. Jayne, Tiffin, for defendant.

4046—Lorenzo D. Cornell vs Ohio Graven et al. Error to the Circuit court of Holmes county. John Huston, Jr., Millersburgh, for plaintiff; W. Stilwell and D. T. Simpson, Millersburgh, for defendants.

4047—Virginia John vs Washington D. John, Error to the Circuit court of Darke county. Anderson & Bowman, Greenville, for plaintiff; M. C. Miller for defendant.

Sixth Judicial Circuit.

JURISDICTION.

Transfer of a Criminal Case from Common Pleas to Probate Court.

(Huron Co. Circuit Court—May Term 1894. Present Hon. C. S. Bentley, P. J., C. H. Scribner and G. R. Haynes, J. J.)

Chas. Smith, plaintiff in error, vs The State of Ohio, defendant in error.

Defendant, Plaintiff in error, was arrested upon indictment found by the grand jury upon evidence taken before it, it nowhere appearing that defendant was arrested upon a charge upon an affidavit of any party before an examining magistrate. The indictment having been returned to the Court of Common Pleas, the following entry was made upon the journal of that Court: "By consent of attorneys this cause is transferred to the Probate Court." HELD, that section 5467, the only statute authorizing the transfer of a criminal case from the Court of Common Pleas to the Probate Court, conferred no jurisdiction on the Probate Court in the case at bar and that said court had no authority to proceed with the prosecution.

Where a person is prosecuted under the statute for misdemeanor and fine, he may at any time raise the question as to the jurisdiction of the Court over the suit in which he is convicted.—(ED. LEGAL NEWS).

HAYNES, J.

In the case of Charles Smith vs the State of Ohio, the petition in error is prosecuted for the purpose of reversing the judgment of the court of common pleas, which judgment affirmed the judgment of the probate court of this county, wherein the plaintiff in error, Charles Smith, was prosecuted for misdemeanor, convicted and sentenced for punishment, both fine and imprisonment, I believe.

The record filed and attached to the petition in error, filed in the court of common pleas; discloses that at the November term, 1891, the following entry was made, on the journal of the court of common Pleas; "The state of Ohio vs Charles Smith, indictment for allowing saloon to be open on Sunday and selling intoxicating liquor on Sunday." Also the following entry in same case on November 30th, 1891, "By consent of attorneys, this cause is transferred to the Probate Court." Attached to that petition is also a series of entries in the journal of the

Probate Court, the first of which is as follows: "The State of Ohio vs Charles Smith, December 8th, 1891. This day the transcript of the proceedings had in the common pleas court in this cause was filed herein. Said Charles Smith being charged with allowing saloon to be open on Sunday and selling intoxicating liquor on Sunday."

"December 14th, 1891. This day came T. H. Kellogg, prosecuting attorney and filed herein information in both indictments upon the transcripts from the court of common pleas, heretofore filed."

It then notes continuances from time to time until April 13th, 1892, when it recites that "This day came the State of Ohio by J. R. McKnight, Prosecuting Attorney, and the defendant, Charles Smith, in person and by his counsel, and thereupon the defendant filed a motion for continuance, on consideration whereof the court overruled said motion. Thereupon the said defendant filed a motion to quash the first count of the information which was argued by counsel, & etc. and was overruled.

Thereupon a jury was called, trial had, and a verdict was returned: "We, the jury in this case, find the defendant, Charles Smith guilty in manner and form as he stands charged in the first and second counts of the information."

Afterwards a motion for a new trial was made and argued and overruled and sentence was imposed upon the defendant. Whereupon, the court asked the defendant if he had anything to say why judgment should not be pronounced against him, and he having nothing to say, "it is therefore ordered and adjudged that on the first count of information, the said Charles Smith pay a fine of \$25.00 and the costs of these proceedings taxed at \$— and be confined in the county Jail 10 days, and until the fine and costs are paid. And on the second count of said information, said Charles Smith pay a fine of \$50.00 and the costs of this proceedings taxed at \$— and be confined in the

county jail 20 days, and until the fine and costs are paid."

With that, a bill of exceptions was taken upon the overruling of the motion for a new trial, and the case was presented to us at Toledo for an order suspending the judgment until the case could be heard here, and now the case has been argued by counsel and submitted for decision.

I may say, without going through in detail, it appears that the indictment was returned by the grand jury. Beyond that, it nowhere appears that the defendant was ever arrested upon that, nor upon a charge made upon an affidavit of any party before an examining magistrate.

So far as appears by the record, an indictment was found by the grand jury upon evidence taken before it, and that indictment having been returned to the court of common pleas, these proceedings were had which I have stated.

The first question that arises here is whether the probate court, by virtue of this proceeding, obtained any jurisdiction whatever to prosecute the defendant for the alleged offenses. The Statute, section 5467, provides that "All recognizances which shall or may be taken by any justice of the peace in said counties, or other officers in said counties authorized to take the same, and all transcripts of criminal cases within the jurisdiction of said probate court, as defined by law, may be returned either to the probate court or the court of common pleas of said counties; and the same shall be returned to one or the other of said courts forthwith after the commitment of the person charged with the offense, or after the taking of a recognizance for his appearance before one or the other of said courts."

Thereupon, it provides that the prosecutor may, at his election proceed in either of said courts with the prosecution. That is the case in which the probate court has jurisdiction.

"The accused shall be bound to appear therein and to answer his recognizance, and on demand by the prosecuting attorney, the probate judge, or clerk of the

court of common pleas, shall certify the recognizance and all other papers in the case, returned to his court by the justice or other officer, to the court in which the prosecuting attorney elects to proceed." That is the only statute we find. There is no other authority for the transfer of a criminal case from the court of common pleas to the probate court of this county.

There is a statute, section 6454a, which authorizes the transfer of certain cases in Cuyahoga county from the court of common pleas to the Probate court. The transfer therefore, of this case in the manner stated in the record by the court of common pleas of this county to the probate court, conferred, in our judgment, no jurisdiction whatever upon the probate court to proceed with the prosecution,

Section 6457, has a provision: "The prosecuting attorney of any such county may file his information originally in the probate court, without a preliminary hearing before an examining court, upon the proper affidavits being filed therein, and the judge shall issue his warrant for the arrest of the defendant, who, when arrested, shall be taken before said judge, and thereupon, if not discharged, be recognized to appear at the next term of court, or in default thereof, to be committed to the jail of the proper county."

It will be observed there that the condition upon which the prosecuting attorney may file an information originally in the probate court and proceed to have the party arrested and tried in that court, is when proper affidavits are filed charging the party with the crime. The propriety of that will be seen by referring to the decision of the supreme court in 3 Ohio State, in the case of Gates & Goodno vs the State, decided in 1854. The supreme court decided that "the general rule established by an act defining the jurisdiction and regulating the practice of the probate courts" is that prosecutions shall originate in a proceeding before some officer who can hear testimony and decide upon its sufficiency, to put the accused on his defense before the probate court."

At that time all prosecution should be

commenced before an examining magistrate and from that come up to the probate court, but with the passage of the act which is embodied in section 6457, the prosecuting attorney was allowed to file an original information in the probate court, when the proper affidavits had been filed, so that that court occupied a double position of probate court and examining court so far as jurisdiction is concerned.

In 1880, a case came before the supreme court which led to a very full discussion of the question, following some other decisions that had been had at that time, followed in 3, Ohio State. There is quite a full discussion of it in the case of Eschenlaub vs The State. That was the case in which there had been sworn out a search warrant, and certain property had been found; but the proceedings with the search warrant were not in accordance with the statute. The prosecuting attorney of the court, however, filed an information in court, the party was arrested and brought before the court, tried and found guilty of receiving stolen property. The question came up as to whether that court had jurisdiction, or could have jurisdiction.

This is the syllabus of the case: "One charged with the commission of a misdemeanor was prosecuted by information, and the information being unsupported by oath or affirmation, the accused moved to quash it for that cause, which motion was overruled. Held, that in overruling such motion, there was error." It is a case that is quite fully discussed and cites Article first, section 14, of the Constitution.

Without going into the reading of the case, it is sufficient to say that the gist of the case is embodied in the following citation from the opinion of the court:

"We regard the section quoted (art. 1, Section 14) as asserting this important principle, that no person shall be placed on trial for a crime against the law of this state upon the mere information of a public prosecutor, nor until he has been

charged with the commission of such crime upon oath or affirmation. An indictment being founded upon oath or affirmation, of course, satisfies the requirements of the constitution."

It will be seen therefore, that there was no law for the filing of the indictment that was returned into court of common pleas in the probate court, if, indeed, it was ever filed there. It was among the papers loosely, and it is assumed that it was filed there. We think the paper itself gave the court no jurisdiction, and in that position we are fortified by the case that was decided in the supreme court of this state in 11 Ohio State. That action was in the nature of a civil action. It appeared that the Dayton & Western Railroad Company had entered upon some land and used it for railroad purposes under an agreement stipulating that they should pay for the land. Certain arbitrators were chosen, but they were unable to agree. Thereupon the owner of the property, Hugh Marshall by name, brought an action by way of injunction to compel the parties to pay the price of the land, or cease to use the road. The railroad company demurred to the petition, and afterwards such proceedings were had that the following entry was made.

"This cause coming on to be heard upon the demurrer of the defendant to the complaint's bill, and the court being advised, do overrule the demurrer, and thereupon, by consent of parties, the defendant files his answer and submits to the following decretal order, to wit: (It will be observed that the railroad company filed its answer, and it consented to the decree which was made), to wit: That the defendant shall, within sixty days from this date, by their proper officer, to wit, the president of the company, make out a statement containing a specific description of each parcel of the complaint's property and rights specified in the bill, which they have taken and occupied in the construction and for the use of their railroad, and within the time aforesaid, they file the same with the pro-

bate judge of this county preparatory to an assessment of the damages sustained by the complainant by reason of said appropriation and use of his property for the purpose aforesaid, and the compensation which he ought to receive therefor, and further equities be reserved until the next term of this court, to which time this cause is continued." The company afterwards refused to comply with the order and, it seems, they had a mandamus by way of contempt.

Thereupon, the court raised the question whether the probate court had jurisdiction, or could have jurisdiction to hear and determine that case.

The first of the syllabus of the case, is as follows: "The probate court, under the act of 30th, of April, 1852, to provide for compensation to owners of property taken for use of corporations, has a special and limited jurisdiction to be exercised in the cases, and in the mode prescribed in the act; and that court cannot, under an order of the court of common pleas, and to carry into effect that order, take jurisdiction of a case, or proceed in a mode not authorized by the act."

After some discussion of the question, the court say: "Assuming these views to be correct, as applicable to an ordinary proceeding under the act, it is manifest that the present proceeding can only be sustained on the ground that it was had in virtue of the decretal order of the court of common pleas, in the suit in chancery pending between the parties. This leads to the inquiry whether it was competent for the probate court to exercise a jurisdiction conferred, not by the statute, but by the order of another court. And we think it was not within the competency of the court of common pleas to confer, or the probate court to acquire and exercise, jurisdiction in this mode."

That is to say, the court could only have jurisdiction in the case by the exercise of the statute. It received its jurisdiction in that manner.

It will be observed in the statement of the case that no question was raised as to the jurisdiction of the court before the

trial. We have had occasion to discuss somewhat the rules that should govern a court in a case of that kind, or what the rights of the state might be in that respect.

Section 5472 of the statute provides that, "The provisions governing criminal proceedings in the court of common pleas shall so far as applicable, govern like proceedings in the probate court."

Provision is made in the statutes governing proceedings in criminal cases for the filing of motions, pleas in abatement and demurrers and after trial, after a verdict, section 7353, provides that "A motion in arrest of judgment may be granted by the court for either of the following causes:

1. That the grand jury which found the indictment had no legal authority to inquire into the offense charged, by reason of such offense not being within the jurisdiction of the court.
2. That the facts stated in the indictment do not constitute an offense."

Now, light may be thrown on this from the case in 27 Ohio State, wherein Carper had been indicated for playing a certain game called draw poker and had pleaded guilty to the accusation and afterwards he raised some objections to being punished for the offense

The court discussed some of the effects of these statutes, and says, "by section 195, (which is now in the section I have read, 7353), he may plead in arrest of judgment.

1. That the grand jury which found the indictment had no legal authority to inquire into the offense charged, by reason of it not being within the jurisdiction of the court."

And they say, "We suppose, notwithstanding the plea of guilty the defendant may object to the jurisdiction of the court, or the grand jury, over the subject matter, or that no offense was charged against him; but not for any defect of form or manner of stating the facts, if

there was a substantial charge of an offense."

We suppose it to be a rule of law very well established that consent of parties cannot confer jurisdiction of the subject matter upon a court, and we are clearly of the opinion from these authorities and the general principles of law, that where a person is prosecuted under the statutes for misdemeanor punishable by imprisonment and fine, that he may at any time raise the question as to the jurisdiction of the court over the suit in which he is convicted.

That question having been raised and submitted to the court, we hold there is only one conclusion to be arrived at in this case, and that is, that as shown in the record, the probate court obtained no jurisdiction whatever to prosecute the defendant for this offense; in other words, that it obtained no jurisdiction to hear and determine the alleged offense set out in the information that was filed by the prosecuting attorney. If our position is correct in that respect, the alleged errors, that occurred during the trial are of no moment whatever.

The court of common pleas having affirmed the judgment of the probate court, the order of this court will be that the judgment of the court of common pleas be reversed, and, proceeding to render the judgment that the court of common pleas should have rendered, the judgment or the sentence of the probate court will also be reversed and an order will be made directing that court to dismiss the information for the reason that it has no jurisdiction whatever to hear and determine the question raised in it. The costs that were made upon the petition in error in the court of common pleas and the costs made upon the petition in error in this court, will be adjudged against the state, the probate court having no jurisdiction there can be no adjudication of the costs in that court by any court.

S. M. Young, attorney for plaintiff in error.

J. R. McKnight, prosecuting attorney.

LIGHTS AT RAILROAD CROSSINGS.

Allegations Necessary to Constitute Cause of Action Against Railroad Companies.

(Wood County Circuit Court April Term, 1894. Present: Hons. C. S. Bentley, P. J., C. H. Scribner and Jas H. Day, J. J.).

288 and 289 Village of Bowling Green, O. vs C. H. & D. Ry Co. and same vs T. C. & C. R. R. Co.

(The council of a municipal corporation has a legal right to require the lighting of a railroad track at a street crossed by a railroad and if the company neglects to fulfill the requirements the Village may erect the necessary lamps, and fixtures and furnish the light at the expense of the railroad company and collect it by suit, if necessary.)

A demurrer to petition, alleging facts required by the statute to constitute a legal liability, on the ground that the ordinances, attached to the petition formed part of the petition, and are so incoherent and vague that they are void, and form no proper basis upon which liability of the defendant can be predicated. HELD, that the ordinances were not part of the petition, and that the demurrer, on the ground of alleged defects in the ordinances, was not well taken.

Municipal corporations may under the law of 1865, sec. 2497 R. S., recover the cost and expense of lighting by electricity, though its use for such purposes was not specifically contemplated by the law in question.

Misnomer in allegation concerning the officer of the company upon which a copy of the ordinance was served, not prejudicial to defendant and could only be taken advantage of by a motion to make petition more definite and certain, and not by demurrer.—ED. LEGAL NEWS).

DAY, J.

These cases are similar except as to one question, a misnomer in No. 288,

The plaintiff, the Village of Bowling Green, brought suit against the railroad company to recover amounts claimed by the Village on account of lighting the track of the railroad company at the crossing of certain streets in the village. Allegations deemed sufficient to show liability against the railroad were made in the petition, and the ordinances providing for the lighting and the assessment of the expense against the company were copied bodily into the petition.

The defendant, Railroad Company, promptly attacked the works

of the Village by motion to compel plaintiff to strike out of its petition the copy of the ordinances incorporated therein, and to make it definite and certain in other respects. This motion was sustained, and an amended petition was filed in which a copy of the ordinances, by order of the court in sustaining this motion, were left out; but copies of the ordinances were attached and filed with the petition and referred to as exhibits but not made part of the petition. A motion to strike out of the amended petition allegations deemed to be immaterial, was overruled by the court. A second motion was presented for that purpose. This motion should have been sustained in part, at least, but the overruling of the motion was not prejudicial in any material degree and therefore not a fatal error.

The next charge against the amended petition was by way of a general demurrer which, on consideration, was sustained. Plaintiff not desiring to further amend, there was judgment on the demurrer dismissing the plaintiff's petition and rendering judgment for costs against it, and this action of the court dismissing the petition, and rendering judgment for costs is assigned for error and a petition in error is filed in this court to reverse that judgment.

The only question presented is as to the sufficiency of the petition. Does the amended petition state a cause of action against the defendant R. R. Co? There is no doubt but that the council of a municipal corporation has a legal right to require the lighting of a railroad track

at a street crossed by a railroad, and if the company neglects to fulfil the requirements, the Village may erect the necessary lamps and fixtures and furnish the light at the expense of the Railroad Co., and collect it by suit if necessary. This is to be done by furnishing the light according to the terms of the statute and the supreme court has held its provisions to be constitutional. Municipal corporations can require the track of a Railroad to be lighted at the expense of the R. R. Co. Sec. 2494 of the R. S. authorizes councils to pass an ordinance, if necessary, requiring a person or corporation owning or operating a railroad in a municipal corporation to light such railroad within a specified time.

Sec. 2495 R. S. provides the ordinance shall specify the manner of lighting, the number or style of lamp posts and lamp and the time the lamps shall be kept lighted. Sec. 2496 requires notice of requirement to light, that is, of the passage of the ordinance declaring the necessity of lighting these crossings to be served upon the company 20 days before the R. R. Co. shall be considered in default, and this notice may be given by delivering to any person having supervision or charge of the railroad to be lighted a copy of the ordinance. Sec. 2497 provides if the person or company operating such railway fail or neglect to light it for 20 days after notice served as provided in the preceding section, the council may at once cause the lighting to be done at the expense of the person

or Company operating the railroad. Section 2498 authorizes the council to direct the manner in which the expense of lighting shall be assessed and collected, provided that when assessed it shall be a lien which may be enforced as other liens are.

The amended petition avers these facts, and the demurrer admits the truth of the averments, that the defendant Co. C. H. & D. R. R. Co. is a corporation operating a railroad within the corporate limits of Bowling Green; that in December, 1891 the council duly passed an ordinance, (the title of which ordinance is copied into the petition and a copy of the ordinance itself is attached and filed with the petition and marked "Exhibit A"), requiring the defendant Company to light portions of its tracks within the corporate limits with electric lights placed at different points named, the posts, lamps and attachments to be similar in all respects to lamps now used by the Village in lighting; directing how many hours lights should burn, time when the light should commence; and that on January 9th, 1892, a copy of this ordinance was served on one C. Neilson who had charge and management of the railroad to be lighted; that the defendant refused and neglected to comply with the reasonable requirements of this ordinance for more than 20 days after service was made upon it and on March 1st, 1892, the Village caused the lamp posts to be erected and the track lighted at the points indicated at an expense of \$202.05; that on the 8th of August, 1892, a second ordinance was duly passed assessing the ex-

pense against the defendant railroad Co., and directing the City Solicitor to collect from the defendant Co.

There is an averment that there is due the plaintiff, the Village of Bowling Green from the defendant R. R. Co. \$202.05 with interest from the date mentioned, and a prayer for judgment. The petition contains a statement of every fact required by the Statute to constitute a legal liability against the defendant. It is urged by the demurrant that the ordinances passed and attached to the petition as Exhibits A and B are part of the petition;—formed part of the petition;—(and this in the face of the fact that copies of the ordinances which were incorporated into and formed part of the original petition were struck out on a motion of counsel for defendant), that the ordinances are so incoherent and vague that they are void and form no proper basis upon which liability of the defendant can be predicated; and this criticism forms the main grounds of the attack on the petition. It must be confessed that in orderly arrangement, composition and syntax, the ordinances are not models of literary excellence but we are of the opinion that, at this stage of the proceeding, they are not before the Court, and their merits cannot be considered by the Court. The Supreme Court of this State in 29 O. S. held that copies of written instruments attached to and filed with the petition form no part of the pleading. Another decision is to the effect that if copies of written instruments other than for the uncon-

ditional payment of money or even such as may be copied and attached to and filed with a pleading, (see secs. 5085 and 5086), are included in the petition or in a pleading they will on motion be stricken out as improper, holding substantially that incorporation of copies of such instruments is an improper way of pleading, and even when they are attached they form no part of the pleading and are to be disregarded.

If this conclusion is correct, it practically disposes of the demurrer adversely to the claim of the defendant as to the alleged defects of these ordinances. There were other propositions argued at the hearing which perhaps with one or two exceptions could hardly be raised by demurrer but should be raised by motion to make more definite and certain. It was bravely argued that electric lighting was undiscovered in 1869 when this law was enacted, and therefore it could not have been the legislative intention to authorize councils of villages to require lighting by electricity; and that light by councils of municipalities under this law must be confined to tallow dips, oil and gas, and in this, I fear, the counsel have unintentionally done our Solons injustice. These gentlemen who assemble annually or bi-annually as is now proposed, are all statesmen, and they not only have knowledge for the present but also any amount of prescience as to the future developments and discoveries which shall be made in the march of civilization and they make their laws applicable to fit the ever changing conditions

of the race. I do not know how my brothers may feel upon the subject, but we must presume and hold that the legislature of 1869 in passing this law made it applicable to this case and intended under it that this company would be required to provide electric lighting in this village in 1892.

In the case first named No. 288 (the Village of Bowling Green against the C. H. & D. R. R. Co.) it is argued that there was a misnomer. In other words that the notice of the ordinance requiring the lighting, which must, under the provisions of the statute be served upon the Company that is operating or controlling the track to be lighted, was not served on any official of the C. H. & D. R. R. Co., but that it appears from the allegation in the petition that it was served on a party who was an officer of the C. H. & D. R. R. Co. and that is true.

The averment in the petition is as follows:

On or about the 9th of January, 1892, a duly certified copy of said ordinance was served up C. Neilson, the General Superintendent of the C. H. & D. Ry. Co, being a person having charge and management of said track of railway required to be lighted, and it was served at Cincinnati, Ohio, by sending the same to him in a United States registered letter, which was placed in the post office at Bowling Green addressed to C. Neilson, General Superintendent, C. H. & D. Ry. Co., Cincinnati, Ohio, and received by said C. Neilson and that a written receipt by the clerk of

said Neilson as is provided by law was returned, ... when the motion was filed to strike out a section or two of this amended petition, then was an opportunity, the Court had to perform its duty and strike out about three quarters of this allegation in the petition and in failing to do that perhaps the Court was in error, but as said it was not an error prejudicial to the defendant. But very much of this allegation is surplusage, very much is descriptive of the person, the party upon whom the notice was served.

Here is the substance of the averment which we have in the petition:

On or about the 9th of January 1892, a duly certified copy of said ordinance was served upon C. Neilson, a person having charge and management of said track of railroad required to be lighted. That was a sufficient averment. The Statute requires that a copy of the ordinance requiring lighting shall be served upon the person having charge or management of the track of railway to be lighted. The averment is made here directly. The rule yet extant in matters of demurrer is that no matter if there be surplusage, or awkwardness in the pleading, if there can be fished therefrom the necessary fact, the demurrer is not to be maintained. We find in this case in that respect that the misnomer complained of is simply in the description of the office of person whom it is said had charge of the management of the track upon whom the notice was served. That

makes it entirely immaterial. There are other criticisms that might be made of this pleading, but, as I have said, the question could hardly be raised except by a motion to make more definite and certain. The averment is made that the company was required to light and to erect certain electric lights by causing one electric light to be placed at each of certain crossings, similar in all respects to those used by said village in lighting its street. The averment may be open to criticism that it is not a certain averment of any style of lamp. We think, however, there is a fair implication. There is no direct averment that there was a particular kind of lamp used in this village at the time the particular requirement was made. And though a motion to this probably ought to have been sustained, the fact is sufficiently implied as against a demurrer.

Now we think as against the general demurrer this petition states a cause of action, and if that conclusion is correct, then the Court of Common Pleas was in error in sustaining the demurrer and dismissing the petition. We find in this it was in error and we reverse the judgment on that account, and this Court entering the judgment that the Court of Common Pleas should have rendered overrules the demurrer to the amended petition in both these cases and remands the cases to the Court of Common Pleas for further proceedings. This will be at the costs of defendant in error, judgment for costs accordingly, execution awarded and a special mandate is ordered sent to the Court of Common Pleas for execution for costs.

B. B. Moone, City Solicitor and Jas. O. Troup, for plaintiff in error,

R. D. Marshall & F. A. Baldwin, attorneys for defendant in error.

JOINT USE OF ELECTRIC LIGHT POLES.

(Lucas County Circuit Court, January term, 1894. Present—Hons. C. S. Bentley, P. J.; C. H. Scribner and G. R. Haynes, J.J.)

The Toledo Electric Street Railway Company vs The Western Electric Light and Power Co., et al.

(There being no authority prior to the act of 1886 for municipal authorities to grant to any one the right to occupy its streets for electric light poles, if, for any reason, or under an ordinance, poles had been erected and were existing at the time that the act of 1886 was passed, such poles must be regarded as existing in the streets by the mere sufferance of the city authorities; that therefore they might require them to be removed or they might annex to their maintenance such conditions as the municipal authorities might deem fit and reasonable.

Companies erecting poles, or continuing to use poles already erected after the passage of the law of 1886, not only devoted them to public use, but gave the municipal authorities the right of a continuous reasonable regulation over the same; thereby waiving their common law right to hold their property in such poles exempt from seizure until it has been regularly appropriated under the Statute in the Probate Court and its value assessed by a jury.

The statute of 1886 confers a continuing power in the common council to provide that one company may jointly use the poles of other companies, already in the streets, under certain regulations; and when such joint use is practicable, and to fix the terms for such use, and in the absence of any regulations by the council concerning the compensation to be paid, it is the duty of the company seeking to acquire the use of the same, first, to attempt to agree with the owners respecting the compensation; that failing in this, such company may apply to and a court of Equity will determine the rights of the parties in this regard.

In such a proceeding, taking very largely of the nature of a condemnation proceeding in the Probate Court, the costs will be taxed against the party seeking to obtain joint use of the poles.—*Ed. LEGAL NEWS.*

BENTLEY, J.

I will say at the start that the condition of the plaintiff's pleadings in this case, of course, is not such as to permit them to be commended as models for a basis upon which to carry forward the inquiries which we have finally permitted in the case; but the parties were before us, and from what we thought we discerned in the pleadings to be the controversy which they really had, we formerly entered an order in the case respecting the injunction that had been allowed by the Court of Common Pleas, and subsequently referred certain matters to a referee. We have therefore concluded that the matter should be settled in the present case, and that it might be fairly settled by a decree of the Court.

Several of the important questions arising in this case were considered at some length when, on a former occasion,

the motion to suspend the operation of the injunction granted by the Common Pleas was presented to us, and our views regarding them were stated when we allowed that motion. Thereafter, in consonance with these views, we ordered a reference for the ascertainment of certain facts which we considered it proper and necessary to know in finally determining the case, the proofs regarding which, but for the reference, we should have heard here in court on the trial. Our investigation of the case since its final submission has necessarily led us through the same fields as those traversed before, as well as others, and we are still impressed with the correctness of the general conclusions already announced, and that the pleadings present a basis for the inquiry as to what particular poles the plaintiff seeks to use, the ownership and condition of the same, whether they are in the streets under such circumstances that the city may lawfully grant to an electric lighting company other than the present owners and occupants thereof, and *in invitum* as to them, the right jointly with them to use such poles to string electric wires upon for lighting either public or private buildings with electricity; whether the plaintiff has been lawfully granted such right by the city authorities, wherever such joint use is practicable, and if so, the amount which the plaintiff should pay for such use before entering upon it, and to whom payment should be made.

The defendants urge that if such use of their poles can be acquired, it must be by proceedings for appropriation in the Probate Court, and that a court of equity would have no jurisdiction of the case nor to determine the amount, unless by some contract, express or implied, the defendants have waived, forfeited or granted away their common law right to hold their property exempt from such seizure until it has been regularly appropriated under the statute in the Probate court and its value assessed by a jury and paid. And, in the sense in which we construe it, this proposition is correct, and this leads to the inquiry which lies at the main root of the controversy, whether by voluntary act, viewed with reference to the facts and laws; these defendants have subjected their property to the liability of being thus practically taken without the compensation therefor being ascertained by a jury.

To determine this, a brief review of the laws bearing upon the matter will be requisite. It seems to have been always assumed by the Legislature that municipal authorities would not have authority under the general powers as to streets, to

allow telegraph, telephone and electric light poles to be placed in the streets and from time to time statutes have been passed conferring upon them certain powers in this respect. And in this connection I call attention to the sections of the Revised Statutes from 3454 to 3471 (a) inclusive. And in *5 Ohio Circuit Court*, 340, it was held by the Circuit court of Hamilton county that until the Act of May 12, 1886, municipal corporations had no power to allow in the streets poles and structures for electric light and power purposes. This holding has the apparent sanction of the Supreme court, since it affirmed the judgment of the Circuit court in that case, but without report.

The act of 1886 now appears in Smith & Benedict's Statutes as section 85-233, and provides as follows:

"That a company organized for the purpose of supplying electricity for power purposes, and for lighting the streets and public and private buildings of a city, village or town, may manufacture, sell and furnish electric light and power required therein for such and other purposes, and such companies may construct lines for conducting electricity for power and light purposes, through the streets, alleys, lanes, lands, squares and public places of such city, village or town by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires, with the consent of the municipal authorities of the city, village or town, and under such reasonable regulations as they might prescribe. Provided, that all wires erected and operated under the provisions of this act shall be covered with a water-proof insulation, and said poles, piers, abutments and wires shall be so located and arranged as not to interfere with the successful operation of existing telephone and telegraph wires."

It becomes important to consider the scope and meaning of the words "with the consent of the municipal authorities . . . and under such reasonable regulations as they may prescribe."

It is evident that this power of regulation is something more than the city might exercise under its general authority over the streets, since if it means no more than that, the insertion of those words in the statute would have been unnecessary, which the rules for the interpretation of statutes will not permit us to presume. Do these words confer the power to allow other electric companies to share in the use of such poles and structures when it would be practicable, and to prescribe reasonable terms and conditions upon which the added use may be had? In this connection I will call attention to the case already

mentioned of *Brush Electric Light Co., vs Jones Bros. Electric Light Co., et al*, 5 O. C. 37. In that case, after the court had announced what I have already mentioned, that there was no power previous to this act to entitle municipal authorities to grant the right to use the street for these purposes, on page 343 the court say this:

"There is nothing whatever to show, that after power was given to the municipal authorities to make such grant, any action required by these two sections was taken. And it is difficult to see how the alleged grant of this franchise is to become valid and binding on the city, or the public, by a mere acquiescence of the public authorities in its use for a while, when the statute is express that it can be granted in but one mode,

"But there is no such proof of continued acquiescence on the part of the municipal authorities as justifies the claim of the plaintiff. It is shown that on the second of November, 1889, the Board of Public Affairs directed the city engineer "to withdraw all permits to erect electric light poles, heretofore used, until further orders;" and on November 3, 1889, such board by resolution provided that they would permit only one line of poles for electric lighting or power purposes, to be erected on any one street. And the board also provided hereby, among other things, that where any street was already occupied by such line of electric poles, that it would allow the company to whom the prior permit was granted, to maintain the line of poles, and would authorize any other company to which a permit had been granted to occupy portions of such territory, to use the poles already on the street, under the terms of the general ordinance of the city. And in a subsequent clause it is provided that when a street is so occupied, the second company applying for the privilege, will be authorized, so far as the chief electrician and chief engineer may deem the same practicable, to occupy the lines of poles of any other company that may be upon the street . . . under the terms of the general ordinance.

"This general ordinance referred to is dated October 18, 1889, and contained substantially similar provisions, and fixed the terms upon which other companies might use the poles of the company which had erected them, viz: by paying a fair proportion of the original cost of the erection thereof, and a monthly rental equivalent to a fair proportion of the cost of the erection and maintenance thereof.

"Under this section of the Board of Public Affairs and of the Council, it is shown that the plaintiff company has obtained

permission to erect by far the larger number of its poles now in the streets of the city, and that the defendant companies have also received like permits, and particularly that they have been authorized by the Board of Public Affairs and its engineer to occupy the poles of the plaintiff, the use of which by them, the plaintiff company is seeking to enjoin and have offered to comply with the terms fixed by the ordinance. It would seem, then, from the statements, that the plaintiff company is occupying the streets of the city, not under a valid or irrevocable grant, but by the mere license and permission of the municipal authorities, and which license is coupled with the condition, impliedly at least, accepted and acted upon by such company, that other companies to which like permits should be granted, should have the privilege of stringing its wires thereon. Can it claim not to be bound by this condition?"

And further on, at the bottom of page 344 and top of page 345, the court say:

"But the resolution of the Board of Public Affairs, under which the plaintiff company is now operating, made it a condition that the poles erected by it, should be subject to the use of other companies, to whom permits to occupy portions of such territory had been granted. And such permits have been given to these two companies, as is conceded, and this would seem to estop the plaintiff from saying that they are not so authorized.

On page 346 is this paragraph:

"It seems to us manifest that it is, and it should certainly be the law, that the right to decide as to the use of the streets of a city by the corporations of this character, should be entrusted to the municipal authorities, and the use thereof by such companies, in the language of the statute, should be 'under such reasonable regulations as they may prescribe.'" The idea that any number of such companies may erect their poles in the streets as they please, of course cannot be tolerated. It would be destructive to the interests of the public. It would seem that the regulations and provisions under which these companies are now using the streets of the city are reasonable and proper—but if not, it can only be said that the plaintiff has accepted the license subject to those terms, and must abide by them, so far as this case is concerned."

And thus they hold, it seems to us, that there being no authority prior to the act of 1886 for the municipal authorities to grant this right to use its streets for this purpose, if for any reason, or under an ordinance, as there was one passed in

that case, poles had been erected in the streets and were existing at the time that the act of 1886 was passed, these poles, under such circumstances, must be regarded as existing in the streets by the mere sufferance of the city authorities; and that therefore they might require them to be removed as being there without authority, or they might annex to their maintenance there, such conditions as the municipal authorities might deem fit and reasonable.

In that case it would seem that the permit which the court held effective and binding was not a permit of the council itself by a valid ordinance, since the ordinance which was passed seems to have been conceded invalid on account of some informality in its passage, but the permit was the permit of the Board of Public Affairs, without which, to be sure, a valid ordinance could not be passed, but which in and of itself has no power to pass a binding ordinance. This permission had been granted by such a board in that case, and the court seemed to hold that the companies having allowed their poles either to be erected under that permit, or having maintained their poles afterwards without any permission at all, it must be held that they were occupying the streets subject to the regulation of the Board of Public Affairs. The court, as seen, deals somewhat with this statute as to interpretation, and in the last paragraph the court say, "The use, therefore, by such companies, in the language of the statute, should be 'under such reasonable regulations as they may prescribe'". And the indication is that if these regulations had been reasonable, they would have bound these companies as to these poles, although they had not specifically consented to them or bound themselves to abide by the regulations.

In this connection I also call attention to the case of the *Kinsman Street Railway Co. vs. the Broadway & Newberg St. Ry. Co., et al.*, 36 D. S. 239. I will read from the opinion, beginning at the bottom of page 250, where the court say:

"While we think that it was not within the power of the municipal authorities, by such agreement, to confer upon the plaintiff the right to use these streets for railroad purposes, to the exclusion of all other persons or corporations, if the public welfare or convenience should require a further similar use; we also think that no such exclusive right was intended to be conferred. If an exclusive privilege was intended, it should have been expressed, and we find in the ordinance and resolutions relied on, not only the absence of such expression, but, on the other hand, a different intention indi-

cated: In the ordinance of September 20, 1859, it was declared that "any company organized for the purpose of laying down rails and running street passenger cars to be drawn by horses or mules through the streets of Cleveland, shall be guided, governed and regulated by the conditions (therein expressed) and such restrictions as the council may hereafter pass". And in the resolution of October 25, 1859, containing the grant of right to the plaintiff specially, it is provided that the right is granted "under the terms and conditions prescribed by said ordinance" (of September 20th, 1859), "or which may hereafter be prescribed by the city council." And a like stipulation is contained in the subsequent resolutions authorizing a change of route. We have no doubt, that under the power thus stipulated for (if such reservation had been at all necessary) the municipal authorities might at any time thereafter (if it was thought the public convenience required it) grant the like privilege to another company to use and occupy the same streets, and indeed the same route, for railroad purposes, to be used in common with the company or companies to whom the privilege was first granted."

And on page 252:

"When, therefore, a right of way for street railroad purposes is granted over the same route to another company by the municipal authorities, the private property of the former cannot be appropriated by the latter company until compensation is first paid by the latter to the former company. And, in the absence of a stipulation to the contrary, it is quite clear to our minds, that the municipal authorities had no more power to fix the amount of the compensation that should be paid by the latter to the former company for the right of the joint use of such material, than it has to determine the compensation to be paid to other owners of private property taken for the same public use. In such case, if no agreement be made between the companies as to the matter of compensation, or the same be not assessed by a jury as in other cases of the condemnation of private property to public uses the latter company should be enjoined from the forcible appropriation.

"But in this case we find a stipulation to have been made; namely, that the plaintiff would lay its tracks under the terms and conditions prescribed by the ordinance of September 20, 1859, or which might thereafter be prescribed by the city council; and, also, that the East Cleveland Street Railroad Company (a corporation then in existence) should be allowed the use of the plaintiff's track upon reasonable terms, to be prescribed

by the council, unless agreed upon by the parties. The right of the council to prescribe "terms and conditions" in the future, it seems to us, was sufficiently broad to cover a future exigency like the one then existing, and specially provided for; namely, an exigency arising from the necessity to provide for the public welfare by running the cars of other street railroad companies over the track of the plaintiff. And this being so, the only question remaining is, was the condition as to the compensation to be paid by the Broadway & Newberg Company to the plaintiff reasonable? In other words, was the compensation, as fixed by the council, fair and adequate? Upon this question issue was joined, but no testimony offered. The burden of showing its inadequacy rests upon the plaintiff. Under these circumstances, the injunction prayed for must be denied."

A study of that case will show this; that the particular stipulation that the council might itself fix the compensation did not apply, and was not made to apply especially to the company in question, but to another company; and the judgment must be supported upon the idea that the agreement that the council might prescribe terms and conditions was sufficient authority for the council, in fixing "terms and conditions," to fix what was regarded as a reasonable compensation for the use of the property thus appropriated.

In the present case the ordinances which have been received in evidence do not go to the extent that the ordinances did in that case, but in that case there was no such statute as applies here; and the terms of the statute of 1886 in this respect seems to us as full and as ample as the provisions of the ordinances in this case in 36 O. S. So that instead of, as in that case, operating in placing and maintaining the poles in the street under an implied agreement accepting some ordinance allowing the council to fix terms and conditions for placing and maintaining them, they are under the general provisions of the law of the State, which would allow the council to permit them to be placed and maintained in the streets under such reasonable regulations as the city authorities might impose.

The question as to some of these poles, at least, is, whether the power thus given in the statute of 1886 is to be regarded as a continuing power, or whether it must be exercised, if exercised at all, in fixing terms and conditions at the time that a permit is given to the companies to occupy the streets. If it is such a continuing power of regulating, does it so involve the power to fix reasonable terms

upon which another company may use the poles, as would justify the imposition of such reasonable terms upon the companies at any time for maintaining those poles? We have, upon such study as we have been able to give to it—and we have given a great deal—come to the conclusion that this statute in that respect is one that has a continuous operation. In view of the fact that the council has no power to grant an exclusive right in the streets, in view of the terms of the statute itself, in view of the public exigencies that must necessarily arise and may be supposed and presumed to arise, and should have been within the view of the Legislature at the time it passed the statute, we must conclude that this provision of the act of 1886 is so continuing in its nature and scope that the council may regulate the use of these poles from time to time. Such regulation, of course, must always be reasonable, and must be had with a view to the fair rights and equities of those maintaining the poles.

As to this branch, we think the case in 55 *N. W. Rep.* cited by counsel may be of service. This was a case where the Supreme court of Michigan finally enjoined the use by a subsequent company of the poles of the persons who had placed them in the streets before that; but in the course of the argument the reason upon which the court seemed to act all through finally appears. I call attention to a paragraph beginning on page 454, in which the court say this:

"Defendant Sands claims that there was a committee of the council empowered to act in the matter after this resolution was passed, and such committee could fix the manner of the use."

There it was a provision, simply, that they might use the poles already in the streets under the direction of a committee of the council.

"The committee was known as the 'street lighting committee,' but nothing appeared of record in the proceedings of the common council empowering this committee to act or to make any regulations for the use of the poles. It is contended, further, by the defendant Sands that after the resolution was passed he called upon the president of the complainant company, and was told by him to designate any poles he wished to use for public lighting, and he could use them, and that he would be charged in proportion to the number of wires used; and that, acting under this, and the direction of the committee, he attempted to put up the cross-arms, when he was stopped by the injunction. There is no claim, however, on the part of the defendant that any arrangement was con-

sumated with Mr. Hart, president of the company, as to the manner of the defendant's use of the poles, or the manner of stringing the wires. The committee of the council who directed Sands to go on with the work and use the complainant's poles do not pretend that any regulations were adopted or the manner of their use fixed by the committee, or how many wires were to be placed on the poles or where located. There can be no doubt that under the charter provisions the common council had the power to pass the ordinances above set out, and to grant the franchise to the complainant, with the resolutions therein contained. After this was done, however, and the complainant had erected the poles, the council could not, by this resolution, do what was attempted to be done there, without first fixing in a definite way the use which it was attempted to confer upon defendant Sands. The power to make such reasonable regulations for the use of the poles is lodged by the statute in the council, and cannot be delegated to a committee. The language of the statute is that such corporation shall have power to lay, construct, and maintain, conductors for conducting electricity through the streets, etc., "with the consent of the municipal authorities, thereof, under such reasonable regulations as they may prescribe."

These are almost identically the words used in the Ohio statute in 1886. On page 455 the court proceeds:

"We are not able to say from this record that a joint use cannot be made of the poles by the Sands company and the complainant. If such joint use appeared conclusively to us to be dangerous, we should unhesitatingly set the ordinances and resolutions aside, granting to Sands any use of the complainant's poles. We are not, however, satisfied upon that point, and shall in the present case only decide the resolution unreasonable, as not providing proper regulations for a joint use."

The court proceeds to hold that on account of a want of provisions for definite regulations, that the parties could not go on and use the poles already in the streets, and the concluding paragraph is as follows:

"For the reason pointed out, the decree of the court below must be reversed, and decree entered here in favor of complainant, restraining defendant, Sands, from using its poles until the city, by its council, shall, after notice to the parties interested, adopt suitable rules and regulations for such joint use."

In effect the supreme court of Michigan held that under a provision almost identical with the words of the Ohio Statute of

1886, the council had the right and power to provide that existing poles in the streets might be used by another company or person for its or his electrical purposes; it only holding in the particular that there was a defect in the proceedings, not because the council has no power to grant it under those terms, but because they had not provided reasonable regulations, and that that must be done by the council; that the committee to which this matter was referred had no power to exact any terms, and to fix them, and that in fact they did not fix them, but under the terms granted by the committee, the defendants might go on and use all of the poles that Sands had put in the streets, to the utter exclusion of Sands, and without any regulations whatever. But the case in this respect is in line with our conclusion regarding the scope and effect of this statute of 1886, viz: that it confers a power and a continuing power in the common council, to provide that another company may use the poles already in the streets, where it is practicable, and to fix the terms.

It was necessary, in order to sustain the plaintiff's case as to all these poles, to find an underlying power of this nature that would affect all of the poles which were sought to be taken. That is, there were some of these poles that were not erected under the permission given by the officers of the city; some of them were erected by the Consolidated Company, and some of them had been in the street before that time; and it was sought to take some poles to which these permits accepted by the Consolidated Company could not apply. Of course the foregoing meaning would affect all poles sought to be taken. There would be this additional reason in the matter of the poles which had been erected under the permits granted by the city civil engineer and superintendent of the fire alarm telegraph; that the Consolidated Company having accepted that permission, had under it erected certain of its poles. As to the poles thus erected, whatever may be said as to the absolute authority of these officers to finally fix the rules and regulations under which the poles might be erected in the streets, yet they did assume to fix certain terms. In the Cincinnati case the board of public affairs fixed certain terms under which it would permit the occupancy of the streets. It had no power in and of itself, and alone, to pass upon this matter finally, and yet the Circuit Court in that case, and apparently with the sanction of the Supreme Court, hold that that being the only permit under which the particular poles were erected, it was not competent for the parties themselves accepting those

terms to say that they erected the poles without any conditions, and were not bound by the conditions which they had accepted. So we think that, so far as the poles were erected by the Consolidated Company, in apparent acquiescence with and under the terms of its permits, and after they had been obtained, it must be presumed that they acquiesced in the permission, whatever it was, and agreed to its terms.

But it is said now, even if this were true, that this regulation here is improper and inadequate, because the municipal authorities themselves—that is, the city council—have not regulated these matters, and that the case in Michigan would apply, and render these proceedings on the part of the plaintiff improper. This case differs from that in several regards as to the matter now under consideration. In the case there, it is said that the council had not conferred upon the committee any power whatever to make any regulations. In this, by a specific ordinance, the council had granted to these two officers of the city the power to grant these permits and to make certain designations in the permits. In that case it was said that there was nothing to prevent the defendants from utterly excluding the former owner of these poles from their use. In this case it is not sought by the plaintiff to have an exclusive use, but the application is for a joint and equal use, of the poles. By the authority granted to the plaintiff by the ordinance, in this case, there is this restriction: They can use the poles existing in the streets only in case the same is practicable; and under that term "practicable" we think there is quite a range of inquiry. If parties had already set out in the streets certain poles which they were rightfully and lawfully using, it certainly could not be held to be practicable for any officer or any authority to oust such parties entirely from the use of the poles, and give them exclusively to the applying person or corporation. In this case, not only must the permits be given by two officers supposed to be skilled in matters of this kind, in the first place, but after the erection of the structures, and after everything is supposed to be ready for use, then there must be an inspection by these city officers, under the direct authority of the city, and they must certify in writing before the use commences, that these structures thus placed are proper and practicable. Under guards of this kind, we are unable to see that the same state of circumstances is presented as in the Michigan case. So we think that there is a right and a power, under certain condi-

tions and restrictions, for the plaintiff to acquire the right to use these poles.

We referred to the referee certain questions that it would be necessary for up to pass upon. I will first state, however, a little more directly, that in our view of the matter, in erecting these poles, or continuing to use them after the passage of the law in 1885, the companies owning them not only devoted them to public uses—(whereas, if they had only done that, perhaps would have required the plaintiff, in order to get any use of them, to go into the Probate court and appropriate that use)—but having erected or continued the use of them under the statute, that gives the municipal authorities the right of a continuous reasonable regulation. They must be held to have acquiesced in that, and to have put their poles in the street, and maintained them there, with reference to that power, which might at any time be exercised. We are not certain but that the council, and we think, under the holding in 35 O. S., that the council, perhaps, might have provided, either by itself or some agency, some manner of fixing the compensation in the first place; and that if that had been paid or tendered, the parties' right to go into the use would have been perfect, in case the compensation thus fixed was reasonable—leaving, of course, the right to the owners of the poles to have objected, and to apply to a court for the purpose of determining that question.

We regard this case here as one of this sort; the plaintiff had the right, under certain circumstances and reasonable regulations, to go into a joint use of these poles, if it were practicable, yet it was the duty, first, to attempt, in the absence of any regulation by the council allowing it to fix compensation, to agree with the owners respecting the compensation; and that failing, it was not necessary for the plaintiff to go into the Probate court, as in a condemnation proceeding, but it might apply to a court of equity to determine the rights of the parties in this regard. So this court, acting under that view of the case, referred the question of compensation to a referee, as well as certain other facts which we ought to know, to a referee. The referee has reported, among other thing, that it is practicable to use these poles as is suggested and asked. And we take it, that that being practicable, the use is reasonable, and that it will not improperly and unjustifiably interfere with the use which the defendants may make of the poles. He has reported the ownership of the poles, the present use to which each pole is subjected, and what he finds is a reasonable compensation for the use which the

plaintiff seeks. We have seen no reason for disturbing any of the findings that the referee has made in these respects.

And now, if we are right in these propositions, it follows that if the plaintiff shall pay or tender the amount of this compensation thus fixed, which we must deem reasonable, and shall pay such of the expenses and costs as the court may adjudge; it will have a right then to enter upon this use. It will be remembered that this use must still be had under the continual and continued supervision of these two officers, and before anything can be done by way of using these structures, they must certify that the structures are proper and practicable and reasonable in effect.

The decree of the court will be entered as thus outlined—confirming the report of the referee, finding these amounts to be the reasonable compensation that must be paid, and that upon its actual payment or tender, and the payment of the costs to be adjudged against the plaintiff, it may enter upon this use of these poles specified in the report of the referee.

As to the matter of costs it is to be considered that in this case the proceeding in this court is largely of the same nature that a case for appropriation would be, if prosecuted in the Probate court; and there, if he cannot agree with the opposing party as to the value and and as to the use and the taking of the property, he must apply to the Probate court, and there such proceedings are had as shall fix the amount of compensation, and then he must pay it, and he must pay the costs of the proceeding when thus ascertained. An analogy to what the statute provided, and perhaps in fairness and justice, the plaintiff should pay all the costs that would be necessarily and properly made in a proceeding of this kind. We have considered whether or not there were any of these costs that the court should pick out and differentiate, that would not come under this general statement now made. To be sure, this case has been fought with great tenacity, and it has been denied that there is any such power which the court has found to exist; but that controversy has employed more the efforts of counsel than it has the augmenting, perhaps, of actual costs that would be taxable in a proceeding of this kind. The things that we referred to the referee, for instance, were matters that it was necessary for him to find, and it was necessary by reason of the plaintiff's application here to fix them; and we think that the costs made before the referee were fairly and necessarily and properly made in determining the questions that

were submitted to him. And the costs of this court—the taxable costs—would necessarily be attributed largely to the same matter of content between the parties. We have therefore come to the conclusion that the plaintiff should pay the costs of this proceeding which are taxable. The costs that would be ordinarily taxable in a case if it were in the Probate court will be included in this order. What expense there may be by way of stenographer, whether that might or might not be taxable as costs in this case, we have not determined. As we referred this matter to the referee, he perhaps would have been justified in writing out this testimony in long-hand; but we are not at all certain but that he might have been justified in employing a clerk in the first part to write in long-hand. We understand that a stenographer was in fact appointed or acted in the matter, perhaps by the concurrence of the parties. The statutes as to stenographers as applying to this court are in a very deplorable state, and how much of those costs would be taxable in our court it is difficult to say. If not directly taxable, whether or not they should be all taxed against the plaintiff is something we have not discussed at great length, and it is a matter that is still open.

John F. Kunkler and Hurd, Brumback & Thatcher for pliffs.

Doyle, Scott & Lewis, King & Tracy, R. R. Kinkade and Baker, Smith & Baker, for defts.

DEATH BY WRONGFUL ACT.

Under the common law no one could maintain an action for the negligent killing of another; no one was entitled to damages for such an act. The first change in the common law rule was made in England by Lord Campbell's act, (9 and 10 Vict. c. 93, p. 603) which provided that, whenever the death of any person should be caused by the wrongful act, neglect, or default of another in such a manner as would have entitled the party injured to have maintained an action in respect thereof if death had not ensued, an action might be maintained if brought within twelve months after the death of such person in the name of the executor or administrator of the person killed, for the benefit of the wife, husband, parent and child of the person whose death should have been so caused; and that the jury might give such damages as they

might think had resulted to the respective persons for whose benefit the action should be brought; and that the damages so recovered, after deducting the costs not recovered from the defendant, should be divided among such beneficiaries in such shares as the jury by their verdict should find and direct.

The first statute in this country upon the subject was the act of the New York legislature of 1849 (chapter 450). That act made the party, responsible if death had not ensued, liable to an action for damages, notwithstanding the death, to be brought by the personal representatives, and provided that the recovery should be "for the exclusive benefit of the widow and next of kin." The legislatures of the various states have generally copied these acts with more or less accuracy, and many of them have been construed by the courts of England and of this country. Under these statutes the following rules have been established without dissent among the authorities:

The action under them is entirely the creature of the statute. If the right to maintain it and to recover the damages allowed in it, in any case, is not expressly given by these statutes, the judgment rendered cannot stand.

Where such a statute giving a new right of action for damages specifies the person or class of persons for whose exclusive benefit the damages are to be recovered, no damages to any other person or class of persons can be allowed in the action based on the statute.

The damage given by these statutes are not given in satisfaction of the wrong done, but are intended as a compensation to the persons for whose benefit the recovery is permitted for the pecuniary losses they have sustained by death. They must be measured by these losses. There can be no recovery for the injuries or suffering of the deceased, or for the anxiety, sorrow, or bereavement of those who survive.

If no such person or class of persons exists as that specified in the statute, as the beneficiary of the recovery, no action can be maintained, and in order to maintain the action the existence of the beneficiary and the pecuniary loss must be alleged and proved.—American Lawyer.

Toledo Legal News.

OFFICIAL LAW JOURNAL OF LUCAS
COUNTY, OHIO.

In the matter of the designation of a daily Law Journal in Lucas County. As required by Sec. 1 of an Act passed April 14th, 1884, and amended Feb'y 25, 1886, entitled "An Act relating to the posting of court calendars and legal notices in certain counties," as amended May 9, 1884, the Judges of the Courts of Record in said County other than the Circuit Court, hereby jointly designate the TOLEDO LEGAL NEWS, a daily law journal published in said County, as the journal wherein until the further order of said judges, shall be published all the notices, advertisements, abstracts and matters and things specified or referred to in said Section 1.

Approved { GILBERT HARMON,
RICHEN C. LEMMON,
ISAAC P. PUOSLEY,
Judges of Common Pleas.
I. I. MILLARD, Probate Judge.

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NOTES OF RECENT CASES.

Judge Lemmon rendered decisions last week, on motions to strike from petitions in two cases, which have reference to actions very common now.

The cases involved the construction and application of the statute of 1887 in reference to the rights of married women, and their husbands, to sue. The actions were both brought against a Street Railway Co. for personal injuries to the wife and among other things stated as a cause of action in the wife's petition was the amount expended for medical attendance and medicine. For such claims the court allowed the action to proceed in the name of the husband and ordered the same stricken from the petition of the wife.

The husband, among other things, claimed damages for loss of his wife's services, while she was ill from the effects of the accident. These items, the court held, were properly, under the statute of 1887, a part of the wife's cause of action and the husband could not maintain an action therefor.

The court was first of the opinion that

the husband might recover for loss of his wife's services, but attention being called to the last clause of the statute referred to it was held as stated.

The sections referred to and which the Court construed together are 3111 and 3117—1. The first provides that "Neither husband or wife has any interest in the property of the other except as mentioned in Sections 3110 and 4188."

The last clause of the statute, and the one which changed the opinion of the Court, reads as follows: "In the interpretation of this act, unless the context shows that the contrary was intended, the word 'property' includes lands, tenements, hereditaments, money, goods, chattels, rights and things in action and evidence of debt."

The important decision by Judge Ricks in the suit of Meyers, a hmr. vs Shields, to enjoin the collection of \$183,653.50 which it was claimed had been unlawfully and fraudently withheld from the tax duplicates of Cuyahoga County, will be published in full in our next issue.

The Supreme Court of Michigan, opinion by Justice Grant, has held that a promissory note, signed by several persons, which states that on a certain day a certain sum is to be paid, which sum is to be paid by the signers in proportion to the road tax on lands and property owned and occupied by the signers and on which they pay road tax, creates a several and not a joint liability.

In denying the liability of a railroad company for crushing a person who was caught while passing under cars at a railroad crossing, the Supreme Court of Idaho, in Rumpel vs Oregon Short Line & U. N. R. Co., 22 L. R. A. 725, said: "The custom of the people of the town of Nampa to crawl under the cars when they blockaded the streets, if fully proved, cannot have the slightest effect upon the plaintiff's right to recover, as a custom of the people putting themselves daily in imminent danger of their lives in passing under cars blockading the streets, with an engine attached thereto, could not

excuse the plaintiff in his indulgence in conduct so reckless."

The wharfage rights of riparian proprietors are considered at much length by the Supreme Court of Oregon, in *Lewis vs Portland*, 22 L. R. A. 836, holding that, even if such wharfage rights are merely by license from the state; when wharves have been built they constitute property which must be protected against a revocation of such license.

We were misinformed as to the date of the meeting of the State Bar Association. It occurs in July instead of June, as stated in a recent number of the *LEGAL NEWS*.

The Court of Common Pleas of New York, opinion by Pryor, J., Daly C. J., and Bischoff, J. concurring, has held that the sudden insanity of a witness is a "surprise" in the legal sense and that the fact of insanity developed since his testimony is "newly discovered evidence."

DOES NOT AFFECT PENDING CASES.

The Superior Court of Cincinnati, special term, has just decided that the act repealing the struck jury law does not affect cases pending at the date of its passage.

The following from the Court Index indicates the facts upon which the decision is based.

"This action has been at issue for some time, has been twice tried before struck juries, and upon both trials the jury has disagreed.

The case having been called again for trial yesterday upon the regular calendar, counsel for defendants having directed attention to the fact that their demand for another struck jury is on file and was on file prior to the date of the passage of the recent act of the General Assembly repealing the struck jury law; they therefore ask that the case be transferred to the list of struck jury cases, and that they be given the right to a trial before a struck jury." The motion to send the case before a struck jury was granted.

We have the decision, by Smith, J., in full and it will be published later.

JOSEPH D. FORD.

It is seldom that such universal sorrow falls to the lot of any man as was manifest at the death of Joseph D. Ford, whose sudden demise was mentioned in the *LEGAL NEWS* last week. Could the warm hearted, talented lawyer have stood for a moment on the confines of time, and have looked backward, he must have said, "It is well. It was worth all the struggles, all the crosses of a busy life to have won so large a place in the hearts of the people." Had he been permitted to hear the words that were spoken or to have seen the lights which his virtues kindled, he must have gone down into the "valley of the shadow" doubly sure of finding the record clear and bright in the Eternal Kingdom, whose laws, as they are given to us, have been the fundamental principles of his life.

He was laid at rest in Forest Cemetery, the funeral taking place from his late residence, Sunday afternoon at 2:30 o'clock. The pall bearers, chosen at a meeting of the Bar Association on Saturday, were, Hons. Isaac P. Pugsley, J. W. Cummings, L. W. Morris, W. S. Thustun, C. W. Everett, John F. Kunler, Chas. Pratt and E. D. Potter, Jr. The bar met at the Court House and attended the funeral in a body.

On Monday morning the committee appointed to draft and present a memorial made the following report at the meeting, Judges Lemmon, Harmon and Pugsley sitting, at which all members of the Bar, court officials and many others were present.

"The committee appointed at meeting of the members of the Toledo Bar to prepare a suitable memorial and resolution relative to the death of Joseph D. Ford present the following:

MEMORIAL.

"Joseph D. Ford was born in Sherman township, Huron county, Ohio, on the 25th day of June, 1841. He was a son of a pioneer, Daniel B. Ford. His early education was in the common schools of Ohio and later in New Hampshire. He graduated at the Normal school at Winona, Minn., and also attended the law department of the Michigan University.

"In the year 1865 he was a student in the law office of Baker & Collins in Toledo, and was admitted to the Bar in 1867. June 12, 1866, he was married to Sarah E. Morehouse, a daughter of L. L. Morehouse, of Waterville, and took up his residence at Maumee, where he was elected city solicitor in 1867. He resided in Maumee and practiced law there and in Toledo until the fall of 1871, when he was elected prosecuting attorney of Lucas county, and he removed to Toledo about the time he entered upon the duties of that office.

"From that to the time of his death he has lived and practiced law in the city of Toledo.

"His first wife having died he was married October 12, 1870, to Grace G. Moore, the daughter Mr. John A. Moore, then of Maumee, now of Toledo. Two children were born to them, one of whom died; and the wife also died, leaving the

one daughter, Blanche, now living, the only survivor of the family.

"He was again married to Hattie Darling, of Hyde Park, Massachusetts, who died about three years since. Mr. Ford died at the hotel in Cincinnati in the morning of June 1, 1894.

"It has been well said that the time to estimate a man's life and character is at the time of his death. Then when his work is done, and while the memory of him and his work is fresh and clear in the memory of those who were his associates, can his real worth be best judged by those who knew him best.

"Our Brother Ford has been with us, and one of us, for nearly 30 years. He has left us so suddenly and so recently that it is hard to realize that we shall no more see his well known form or smiling face.

"It becomes us then here and now to bear testimony to his ability as a lawyer, and his worth as a man.

"As a lawyer he was diligent and faithful in the preparation of his case, careful and methodical in its presentation. One of our most skillful examiners of witnesses he was clear and logical in his argument to the court. Always pleasing, attractive and persuasive; he was at times truly eloquent in his address to the jury. But beyond this there was a sincerity and honesty in all that he did that went further than all else to win success at the bar, before the court and the jury. He was an honest, man; a manly man—a gentleman. There was no taint or stain upon his moral character. He has been called hence in the midst of the years allotted to men by the Psalmist, but he bears a record of work well done and of a life well spent.

"Therefore, Be it now resolved:

"1st, That we will hold the life and worth of our departed brother in affectionate remembrance, commend his character as an example to others, and emulate his virtues in our own lives.

"2d, That we extend to his doubly bereaved daughter, his brother, sister and other relatives our most hearty sympathy in their affliction.

"3d, That the several State and Federal Courts of our city be respectfully requested to spread the foregoing upon the records, and that the clerks of the courts be asked to send a certified copy of the same and of the action of their courts thereon to the daughter of Mr. Ford.

"J. K. HAMILTON,

"CHAS. PRATT,

"J. F. KIMLER,

"J. W. CUMMINGS,

"W. H. A. READ."

The meeting was a noble tribute to the deceased and the remarks of each speaker, it was very evident, came from the heart. Hon. J. Kent Hamilton, Mr. Ford's partner and almost lifelong friend said:

Your Honors and Gentlemen.

In presenting this memorial it has been suggested, and it is no doubt appropriate, that I should say something concerning the life and character of my friend and associate who has so suddenly gone from us.

Last Memorial Day, when we parted at our office, I little dreamed that the few words of business passing between us would be the last that I should ever hear from his lips. His eye was bright, his step elastic, his form vigorous, and he seemed joyous, happy and full of life. When the message came over the wires from his friend, and mine, Judge Cummings, announcing his sudden death at Cincinnati, the shock which startled the

entire community, as well as his associates at the bar, is remembered by all. In this presence, it is needless to say, that the news to me was an appalling, almost an overwhelming blow, for it was the sudden severing of a relation which had continued uninterrupted for over twenty years. A blow which took from my side a man who had been in my thoughts, and close companionship, in all professional, social and business matters during all that time. That companion had been stricken down, without warning or premonition, leaving a gap in my life which never can be filled.

But he has gone, and he has left nothing behind. No, I will not say that;—He has left much behind him, for he has left the record and memory of a pure, honorable and successful life. The sympathy and feeling, the exhibition of public and private grief, the kindly expressions of affection for his memory show the strong impression he had made upon this people, where for so many years he has lived and labored.

I think it was in the latter part of the year 1865, that my acquaintance with the deceased began. It was after the war. I had come back to take up the broken threads of my legal studies in the office of Baker & Collins, my old preceptors. There I met a young man who had recently come to the office for a like purpose. Subsequently he went to Ann Arbor where he took a course of study in the Law Department. Returning, he settled down in Maumee, remaining there until after the election of 1871, when he was chosen prosecuting attorney of this county. It so happened that he succeeded me in that office, and in taking up the duties of his position he thought he would like to office with me for a while, and so began a companionship, and association, which ripened into a partnership, that lasted, as I have said, uninterruptedly until his death.

The older members of the bar, I believe most all of the members of the bar, remember his career as prosecutor of the pleas of the commonwealth for the three successive terms he was chosen to occupy that position.

He declined the nomination for a fourth term which was offered him in the convention by his party. It is a matter of local, if not of State history, that Joe Ford, as we called him, made one of the very best prosecuting attorneys that this county, or I might say this State, has ever known.

The reputation which he gained in that place of course served him well in private practice. His career at the bar since then

is known to most within hearing of my voice.

It were perhaps better to leave to others to speak of that, but I may be permitted to say that the success which so distinguished him there was owing largely to his private qualities of character. He was a man of absolute integrity; of absolute honesty. He was also a man of great persistency, energy and vigor, not only in the preparation, but in the trial of his cases; and deserved the reputation he early acquired of being a good fighter.

Not only did he bring to bear all the energy and vigor of a strong man to win his cases, but in all respects, he made the cause of his client his own. Never in the conduct of trials did he fail to use all honorable weapons of legal warfare, but as your Honors well know, and none know better, no unworthy weapon, no trick or device were ever used. He would not soil his hands by any act unworthy of the gentleman, the honest man, or the honorable lawyer. He was successful at the bar, more than ordinarily successful. In the struggles of the profession, he met defeat good naturedly, but he never recognized defeat until every legal means had been exhausted to prevent it. He had the average, possibly more than the average, triumphs in forensic contests, but these struggles never left a sting behind. My friends at the bar, I am sure I may say of him who has gone from us, that Joe Ford never to any of us, nor to any member of our profession, said an unkind or discourteous word.

A word as to our personal relations. I know as no one in this community knew, the noble qualities he possessed, and which went to make up the man. I do not care to draw aside the veil of friendship, but I may say in this hearing, and in the presence of these, my friends of the bar, that my companionship with him of more than twenty years was one uninterrupted course of confidence and friendship. There was, I may be permitted to say, the relation of absolute respect and confidence. There was never between us a single word of harshness or coldness, nor other than the utmost kindness and friendliness. Your Honors and my friends may well understand that under these circumstances of sorrow and bereavement the recollection of that fact is to me a solace and a comfort. I knew him as you all knew him, an honest man, a true gentleman; but above all I knew him in every relation of life, as a friend who had stuck to me closer than a brother, and as the years went by, the ties of that friendship had grown stronger and stronger,

until they clasped us to each other with bonds stronger than steel.

Joseph D. Ford cared but little for other struggles than the struggles of the bar. I may say he had no ambitions other than the ambitions of a lawyer. Suggestions have often been made to him, looking toward his promotion in professional or public employment elsewhere, but no, he was content. If the Law is a jealous mistress, she found in Joseph D. Ford a faithful servitor. But while, if Your Honors please, he sought no public employment, he was always much interested in public affairs. Nothing relating to our own municipal affairs, our county, state or national matters, challenged the attention of the public, but that he took in them that strong interest which all good citizens should take. His views and judgment were always ready to serve the side of good citizenship, honest laws, sound morals, and public welfare. Those associated with him in the political arena, know that he was always ready to assist those of his friends who sought from him help and assistance. The primary meetings and conventions of his own party scarcely ever passed without he was present, and his voice, his judgment, and his eloquence were ready to support those principles which he deemed right.

Should I summarize the most prominent characteristic of the man, I should say it was fidelity. Fidelity to his client's cause was his rule of action in his profession. Fidelity to high ideas and lofty standards of duty his rule of action in life and always was he faithful and true to friends. He was a man of most perfect habits. He had no vices and certainly very few faults. There was no single departure from the line of life which marks the course of a good man. Upon the fair record of his fame there lie no lines of doubt, no shadow of suspicion. He was not prone to talk much about the future world, but he, as well as all of us, thought over these things often. I only know that in the later years of his life, he seemed to give more attention to religious matters than formerly. Especially was this true after his marriage with, and the death of his last wife. While she lived he was very regular in attending church services, and after she left his side, almost every Sunday morning, Sunday evenings as well, he went with his little daughter to church. I do not know what he thought about it, but it has seemed to me since his death came so suddenly that it cannot be otherwise than that there is a future existence. Is it possible that all those qualities we esteem, those graces of heart and mind, everything that goes to make

np the man, perish and leave but a mass of lifeless clay? Was it Joe Ford who was brought back here in the car the other day and is this the end of it, all? No, I know it was not the man I knew but his lifeless body. A more earnest conviction of the future life has come to me since that has happened to my friend which we call death than I have ever felt before, and I believe that the man whom we knew still lives somewhere.— somewhere, though we know not where.

What was the cause of his taking off? Why ask the question, and why seek the answer. It is simply one of the insoluble mysteries of this world. Why is it that his career was ended so suddenly? He goes from the side of his family and friends and from our midst busy with the occupations of our profession, but he died as I know he would have wished, for he has said many times that he would prefer to die with his armor on, suddenly, in the very midst of the activities of life, in the midst of the battle.

He bore himself before the world with a brave and unflinching front. There was nothing in his bearing which would tell he was other than a happy man, but those of us who knew him well knew that he was not always happy; for it has been his misfortune to suffer such repeated and severe blows of domestic bereavement as rarely falls to the lot of man.

Thrice, by the strange dispensation of God, had there been taken from his side the partners of his joys and sorrows, and as he has said more than once, it seemed as though a malign and desperate fate was pursuing him. If we were to inquire what weakened his powers and sapped perhaps his life blood and made him liable to fall down before this sudden blow, I should answer it was those awful domestic sorrows. I know very well that they have very much weakened and loosened the ties which bound him to this life, and made him feel ready to go to the life beyond. Joe Ford, I believe to-day has no regrets himself, except for the dear little daughter who is left behind him, twice, yea, thrice orphaned. If he can look back upon the scene of his activities, his toils and his troubles, he would say, as we may all say, that no greater tribute can come to any man than the expressions of sympathy, of affection, and of respect which have been shown by this community where he has for so many years lived and especially by his loved associates of the Lucas County Bar, in this very old Court House, which

was practically the arena of his life's struggles during all these years.

Harvey Scribner was among the earnest speakers and said:—

"If your Honors please and gentlemen of the Bar: When the giant oak falls crashing to the ground, the forest shudders and long years must pass before the unwelcome gap is closed.

"A distinguished and valued member of this body, who towered in our midst so long and was anchored in a security in this life that seemed almost permanent, suddenly, in a breath, is swept from our view.

'Brief as the lighting in the collied night, That in a spleen unfolds both heaven and earth,

And ere a man hath power to say, behold!

The jaws of darkness do devour it up.'

"We stand here gazing on the vacant place, shocked, paralyzed, incapable of comprehending the tragedy. Last Monday he was here among us. We can still see him rising to address the court. His blue eye, honest face and earnest manner are forever engraved upon our memories.

"We commence to recall at once his long history at this bar. We treasure even the little trivial incidents, the witticisms and repartee connected with the trial of cases in which he was engaged. We remember the wonderful skill of his cross examinations, the courage that no disasters seemed to daunt and the gigantic spirit that arose equal to every emergency and often carried a solemn hope to victory.

"His intercourse with members of the bar was marked with sympathy, kindness and almost womanly gentleness. His contests were free, fair and open. His blade always glancing in the sunlight.

"The rights of his clients were as near and dear to him as his life. No application was too great and the watches of the night too long for him to expend in the protection of the interests committed to his care.

"In running over his long professional career, filled with legal conflicts, we note, with the greatest satisfaction, that under all circumstances and at all times he was the same chivalric, courteous and sympathetic gentleman.

"And now that his life's history is closed, we proudly realize that it is not stained by one single unworthy action. He has gone before us, but while the youngest of us remain we will cherish and keep green his memory and long after all of us have departed, tradition will recount his virtues."

Judge Cummings was deeply moved.

He told of the last hours of the deceased and of the messages he gave to him to his daughter—messages nuthought of at the time, but almost prompted by divine hand. Those words of love he had borne to the daughter in hopes that they would be a comfort in these times of sorrow.

Judge Morris spoke with much feeling and City Solicitor Watts told of the kindness and helpfulness to the younger members of the bar, and others besides Mr. Watts related many an incident where he had helped young attorneys during their early struggles.

W. H. A. Read also paid him a glowing tribute.

Prosecuting Attorney Jason Barber said that few would ever know the help Joseph D. Ford had been to him. Association with him, said Mr. Barber, had given him a desire to live a better, nobler and pious life. His life was an example to us all.

J. H. Southard, John T. Greer, L. K. Parks, Judge Hone, M. G. Bloch, T. J. Corkery, Frank Wright and others spoke in a touching manner.

Judge Harmon concluded the remarks by saying: "For my own part and for the other members of the bench I can fully endorse all that has been said of our brother, Joseph D. Ford. His character, his honor, his life, or his deeds, have not been exaggerated. All that has been said of him is true and the tributes have come from the heart.

"He had the kindest regard for the rights of others. His treatment of the jurors, witnesses and to the bench showed this perfectly. His appearance was always that of a man fully convinced of the rights of every man as well as those rights belonging to himself. The words spoken of him to-day are plain and sober facts, not embellished by any attempt at eulogy. Any man could depart this life feeling content in the expression of regard uttered by his brothers. His life was a long, pure record, and I am sure he had a clear and strong faith in the Almighty, and hoped to meet a just reward, as I believe he will."

On Tuesday morning the memorial was presented to Judge Ricks at the session of the U. S. Court and ordered to be placed on record there.

The Toledo Bar will not soon forget Joseph D. Ford; his brother lawyers cannot afford to forget his character, professionally or as a man. In either light it shows the moldings of a higher power, which he was never ashamed to recognize.

U. S. Circuit Court.

Filings.

Staats etc. vs B & O R R Co Depositions on behalf of plff.

1218—Fredrick Leavens et al vs Chas E. Bronson et al. Affidavits of Orlando Coffin, Ambrose Core, C. W. Openlander, Moses H. Haver, Abram Bernard, James Rauk, Zeno H. Miller and W. H. Hughes in support of motion for appointment of receiver.

1218—Same vs Same. Acceptance of service of copy and notice of motion for appointment of receiver by defts Ida E. Stoy, L. Heiland, E. N. Lewis, The Mechts & Farmers Bk of Hicksville, The Dime Sav Bk of Thompson Conn, Geo H. Nichols, The First National Bk of Defiance, First National Bk of Fremont, Anna Lowe, Mary Wells, Ludger Blanchard admr Mary Laughlin, R. H. Burt, admr est Geo M. Swan, August La Fontaine, Flora S. Thacker, S. A. Bruner, guardian Elias Bruner and Emma G. Strong. Parks & Parks, Solrs.

1226—Annev A. Andrews vs The Provident Fund Society. Reply. E. H. Rhoades, atty.

The June term of U. S. Circuit and District Court begins to-morrow morning.

1205—The Continental Trust Co vs The Tol St L & K C Ry Co; intervening petn of Isaac Vauy; personal injuries; damages \$20,000; Hurd, Brumback & Thatcher, attys.

1227—E. and D. Wall Trunk Co vs F. J. Patuca et al; special appearance for purpose of objecting to jurisdiction of the court; Poole & Brown, Chicago.

1072—J. A. Harvey vs B. & O. R. R. Co; praecipe for plffs witness.

1109—Mulcahey vs L. E. & W. R. R. Co; praecipe for defts subpoena.

1182—Farmers L. & T. Co. vs T. A. A. & N. M. Ry Co; answer of F. L. & T. Co to bill of complaint of Cent. Tr. Co; Turner, McClure & Rolston, N. Y; Brown & Geddes, solrs.

Same vs Same; answer of same to int petn Penn Coal Co; same solrs.

1182—Farmers L. & T. Co et al vs T. A. A. & N. M. Ry Co et al; answer of F. L.

& T. Co to int petn of J. M. Ashley; same solrs.

1168—Cornell University vs village of Maumee; depositions on behalf of plff.

1230—Wm H. Kurtz et al vs J W. Long. Summons returned served.

1193—Wm C. Niblack Recr. vs S. W. Reed Assignee. Amended cross bill of complt. Geo W. Keiffhtley and Harris & Thurstin attys for S. W. Reed.

1193—Same vs Same. Amended answer in Equity. Same attys.

1192—Schmidt et al vs City Defiance. Amended petition. Doyle, Scott & Lewis attys.

1088—The Phoenix Furn Co vs The Put-in Bay Hotel Co. et al; intervening petn of Abram Meihlhause; I. N. Huntsberger, atty.

1105—The Continental Tr Co. vs T St L & K C Ry Co. Receivers report for May and for 1 year. Receipts \$2745868.24 from May 22, 1893 to May 22, 1894. Disbursements \$2740089.90. Cash on hand May 31, 1894, \$5778 34.

Law Docket.

958—Philip Kuickle vs L E & W R R Co. Settled on order.

962—F. H. Knapp vs L E & W R R Co. Settled, see order.

966—Osterholt, admx. vs B & O R R Co. Continued.

1016—McPherson vs N Y L E & W F R Co. Continued.

1066—Stuter vs L E & W R R Co. Continued.

1068—Flanders vs B & O R R Co. Contd.

1071—Jay vs B & O R R Co. Settled at costs of plff.

1082—Hays, recr., vs W. R. Mehaffy. Continued.

1092—Western Carolina Bank vs W. H. Young. Passed to 3rd week for trial.

1113—McPherson vs N. Y L E & W. Continued.

1127—Smith vs The Chicago & E. R. R. Co. cont'd.

1133—The Sterling Co. vs The Buckeye Brewing Co., cont'd.

1137—Brundage vs D. Deardorff, et al. Dismissed without prejudice.

1170—Smith, Admx. vs The Penn Co. Settled.

1172—Langabaugh vs S. A. Baxter. Settled, see stipulation.

1187—E. M. Dunlap vs The Thomson, Houston Carbon Co. Pass to Friday of 2nd week.

1192—Schmidt vs City of Defiance. Leave to file amended petition instanter and contd.

1197—Wolf, Admr, vs L. E. & W. R. R. Co. Continued.

1209—McCarty vs The Penn. Co. Submitted, judgt for plff for \$13500 and costs.

1228—Comstock vs O. W. Irish, et al. Decree pro confesso

1187—Eugene M. Dunlap vs the Thomson Houston Carbon Co. Continued by consent

Docket Equity Cases.

394—Cent Tr Co., N. Y. vs The O Cent R R Co. et al. Time extended to July Rule day for answer or demurrer.

486—Barber vs Thayer et al. Stricken from the docket.

1017—Overman vs Lozier & Yost Bicycle Mfg Co. Continued.

1018—Same vs Gendron I W Co. Continued.

1198—Conn Mutual I. I Co, vs Anna B. King et al. Discontinued with prejudice, at cost of complt

1202—Wm C. Niblack Recr. vs R. H. Gleason, Assignee. Submitted, final decree, see entry.

1227—E & D Wall Trunk Co. vs Frank J. Palica et al. Dismissed without prejudice at plff's costs.

1205—Continental Trust Co. vs T St L & K C Ry Co. In re int petn St Louis Merchants Bridge Terminal Ry Co. Ordered that action of Receiver in not adopting agreement of July 1, 1892, be approved, and to that much of petition as prays Recr to adopt agreement, denied.

U. S. District Court.

In Admiralty.

170—Alex Kidd vs S. H. Lawton et al. Answer. Harris & Thurstin, Proctors.

174—Alexander St. John vs steam barge "Walter D." answer and claim of The P. and T. Degnan Sand Dredging company filed; I. N. Huntsberger, Proctor.

175—E. E. Conrad vs barge "Brooklyn" int pet Schueke and Rodd filed; F. W. Rickenbaugh, Proctor.

Conrad vs Barge, "Brooklyn." Ans of E. E. Conrad to int, libels of Chas and Wm Beck. F. W. Rickenbaugh, Proctor.

Libels Filed.

175—Wm Beck vs Barge Brooklyn. Libel for seaman's wages \$79.50. C. T. Johnson, Proctor.

175—Chas Beck vs Same. Libel for seaman's wages \$148.96. Same Proctor.

169 Eley vs Str Shrewsbury. For hearing during term.

172—S. R. Callaway Recr. vs The Orient Ins Co. For hearing on exceptions.

175—Conrad vs Barge Brooklyn. Default as to original libel, order of sale.

174—St John vs Barge Walter D. Ans and claim of the P. & T. Degnan Sand Dredging Co. Order of sale; j e filed.

175—Schucke & Rodd vs Barge Brooklyn. Libel for supplies \$33.50. F. W. Rickenbaugh, Proctor.

36380—Rhodes, Dickelman & Co, vs F. L. Van Fleet. Transcript for lien, judgt \$42.20.

36381—Ketel, Katschke & Co, vs Albert J. Breed. Transcript of lien, judgt \$182.45. E. J. Durbin, T. S. Gifford, attys.

409—35198—Louis Fredericks vs Cyrus M. Locke et al, motion for new trial. G. P. Kirby, atty.

410—35122—Chas H. Waterbury vs John B. Kohne et al, motion for new

trial. Cummings & Lott and A. W Eckert, attys.

36058—Home Bldg & L Co vs Margaret C. Lecklider et al. Answer and cross petition of City of Toledo for use of Home Sav Bank Co. Baker, Smith & Baker, attys.

35598—Guy Monroe, minor, by next of kin, vs Wheeling & Lake Erie Ry Co. Amended petition. Hamilton & Ford, attys.

35167—Harry L. Roberts vs Wabash R R Co. Deposition No. 1 filed behalf deft. A. L. Smith, atty.

35353—Martin Michalak vs Con St Ry Co. 6-2 jury sworn, 6-5 verdict for deit.

Criminal Docket.

882—U. S. vs James Butler. Information, unlawfully bringing contr labor into the U. S. Plea of not guilty, jury sworn, verdict of guilty; fine \$25 and costs.

883—Same vs Gideon Blanchard. Same charge. Plea of not guilty, jury sworn and verdict of guilty; fine of \$25 and costs.

884—Same vs Same. Same charge, same entry.

885—Same vs Chas E. Chenevert and Christian Boisvert. Same charge and same entry.

886—Same vs Same. Same charge and same entry.

887—Same vs Jos Brown. Information, intercepting letters, plea of guilty; fine \$10 and costs.

888—Same vs G. R. Lester. Information, mailing obscene letters; fine of \$10 and costs.

889—Same vs Jos Aberle. Information, mailing obscene letters, plea of guilty; fine of \$10 and costs.

U. S. vs Ira O. Bassett; information; unlawfully holding pension certificate as security for debt; plea of guilty; fine of \$10 and costs.

EXECUTIONS—SHERIFF'S AUTHORITY.

(Hamilton Co. Common Pleas).

(A sheriff has no authority to and cannot apply money made for A on one execution to satisfy another execution against A, both executions being in the sheriff's hands at the same time. Construction of secs. 5482 and 5531, R. S.—ED. LEGAL NEWS.)

95109. Michael Burke vs Peter Renner: memorandum of opinion on motion to vacate and amend return of sheriff on execution.

BUCHWALTER, J.

The issues here presented arise on motion of Burke to vacate certain parts of the sheriff's return on an execution herein, and to amend so as to show that he made on execution certain other money. The return reads as follows:

February 27, 1894: Made on this writ \$150 and all costs, and the balance due on this execution of \$129.19 was paid to me on account of execution in case No. 90339, Common Pleas Court of Hamilton County, Ohio, and case No. 1299, Circuit Court of Hamilton County, Ohio, wherein the Thomas L. Wayne Manufacturing Company were plaintiffs and Michael Burk was defendant.

To so amend the return, puts all the money in the sheriff's hands payable on Burke's demand herein. It is claimed on behalf of the sheriff and the Thomas L. Wayne Manufacturing Company, that the \$150 was made by the sheriff on execution, and that the \$129.19 was paid by Renner, irrespective of this execution, to be applied on account of the execution against Burke in case 90339. Under sec-

tion 5482, which provides, "after the issue of execution against property a person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution; and the sheriff's receipt shall be a sufficient discharge for the amount so paid, or directed to be credited by the judgment creditor on the execution."

The only construction of this section that I am advised of sustains it, and applies its provisions also to the Justice's Court procedure; 15 O. S., 176. *Hollohan vs Crout*. But it appears to me the reasonable meaning is, that any one who voluntarily pays the sheriff his debt, due to the execution debtor, that it is not broad enough to cover an involuntary payment, made to the sheriff with an execution out against the property of such other person.

The execution commanded the sheriff to make the whole of this money (and more) out of the property of Renner, * * * and make due return to this court within sixty days from the date of the writ. And under section 5396, (the money having been made without the sale of real estate,) it became the duty of the sheriff to pay the net proceeds of the same on demand therefor to the execution creditor (Burke.)

Money so made on execution is in the custody of the law, the sheriff being a trustee to pay it over as the court or the law may direct, and prior to the modification of this

trust character by statute section 5531, it could not be attached in his hands: *Dawson vs Holcomb, Sheriff*, 1 O., 275.

Since the enactment of section 5531, the Sheriff may be garnished: *Locke vs Butler*, 19 O. S., 587.

This money was received by the Sheriff from Renner, and has been retained by him, charged with such duty as trustee, under the law, by virtue of the execution.

Having the duty to make the money on the execution, the Sheriff, to receive it in any other capacity, would make breach of his duty under that writ, and if he cannot make it on the execution, he must not receive it.

The law requires that the Sheriff shall satisfy the writs of execution in the order as to priority in which they may be delivered to him, section 5382, and where he is unable to find any property on which to levy, he cannot agree with one claiming under a second execution, that if he will point out property to levy upon, the proceeds thereof shall be first applied to satisfy that writ, and if he do so, it is a breach of his trust duty: *Weber vs King*, (Ham. Dist. C.) 7 Bull., 148.

While it would probably aid in the administration of justice and be within constitutional domain to so modify by statute the relation and duty of the Sheriff, as that he might apply money made by him on execution in favor of an execution creditor to satisfy in whole or part on another execution then in his hands against the property of such person who therein is the execu-

tion creditor, yet it appears clear that neither section 5482 nor section 5531 authorizes the Sheriff in that regard, and that he must be held to have received not only the \$150, but also the \$129.19, upon the execution herein, and that it is his official duty to pay it over under section 5396, to pay it over to Burke or upon his order.

The motion to amend the return herein is accordingly granted, and so much of the motion as calls for amercement (the good faith of the Sheriff being apparent and Burke not now suffering any loss) is overruled.

Wm. Disney for plaintiff.

Jacob H. Bromwell and M. Rusk-in, contra.

SUPERIOR COURT OF CINCINNATI—SPECIAL TERM.

Slander—Statute of Limitations Run From the Time the alleged slander is uttered.

47515—Pearl vs Koch.

SYLLABUS.

Section 4983 of the Revised Statutes requires that action for slander shall be commenced within one year. In a court of law this statute must receive a strict construction, and no exception can be introduced not authorized by the Legislature. The statute of limitations will commence to run from the time the alleged slanderous words are spoken, and not from the time the plaintiff first had knowledge of the fact that they had been spoken.

HUNT, J.

This is an action for slander. The amended petition alleges that the defendant maliciously spoke of and concerning the plaintiff, certain false and malicious representations concerning the character, integrity and business qualifications of the plaintiff. The slanderous words were spoken, as the plaintiff is informed and believes, in the month of September, 1892, but were

not known to the plaintiff, nor did the plaintiff hear of the alleged slanderous language until within three months of the filing of the petition.

The case is before the court on a demurrer to the amended petition on the ground that the cause is barred by the statute of limitations.

Section 4979 of the Revised Statutes provides that civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of the action accrues.

Section 4983, within one year.

An action for libel, slander, assault, battery, malicious prosecution, or false imprisonment.

The question raised by the demurrer is whether the cause of action occurred at the time they were spoken, or whether the statute of limitations commenced to run only when the plaintiff first heard of the slander.

In *Kerns vs Schoomaker*, 4 O., it was expressly held by the court that the statute of limitations commenced to run so soon as the injurious act complained of is perpetrated, although the actual injury is subsequent and could not immediately operate. This was an action on the case to recover damages of the defendant for negligence and omission of duty as Justice of the Peace. The defendant pleaded the statute of limitations. The plaintiff replied that his action was brought within one year after his rights were discerned. To this reply there was a general demurrer, and the demurrer was sustained. The court says that of *Battley vs*

Faulkner 3 C. and A., 288, was exactly this case, for there the issue depended upon the issue of another suit, and could not be assured by a jury until the final result of that suit was definitely known. Yet it held that the plaintiff should have instituted his action and was barred for not doing so. In *Howell vs Young*, 5 B. and C., 254, the same doctrine is affirmed, and the statute held to run from the time of the injury, that being the cause of the action, and not from the time of damages or discovery of the injury.

In *Fee's Administrator, vs Fee*, 100 R., 470 it was held that a fraudulent concealment by which the plaintiff has been delayed will not enlarge the time for bringing an action under the statute of limitations. The defendant plead that the action did not accrue within six years, and the defendant replied that the defendants, in the lifetime of the intestate, received the money without the knowledge of the intestate and until his death fraudulently concealed the same from him, and that the intestate did not know of the receipt of the money, nor did the plaintiff, as his administrator, know of it until within six years before the commencement of his action. To this replication there was a demurrer.

The court laid down the rule in this case that the cause of action accrued on the receipt of the money. It is not sufficient in order to avoid the effect of the statute to aver that the party was ignorant of the fact that he had a cause of action. The plea of the statute goes to the exis-

tence of the cause of action, and not to knowledge of it. It must be remembered that at the time this case was decided the statute contained no exception when facts were concealed from the party injured by the fraud. In this case the plaintiff claimed that the statute did not run, as the facts were fraudulently concealed. The court uses this language; "The most luminous and best considered case to be found in all the books is undoubtedly that of *Troup vs Smith*, 20 Johns, 53. It was there held in an action of assumpsit for negligence and unfaithfulness in the performance of work, that the plaintiff, in answer to a plea of the statute, can not reply a fraudulent concealment of the badness of the work, in consequence of which the plaintiff did not discover the fraud until within six years. The distinction between courts of chancery and courts of law was stated and unanswerably enforced.

"The reason why," continues the court, "a party may avail himself of the fraud in the former courts is well explained by Lord Redesdale in 2 Sch. and Lef., 634. Although the statute, he says, does not in terms apply to suits in equity, it has there been adopted in analogy to this rule of law. And the reason which he gives why, if the fraud has been concealed by the one party until it was discovered by the other, it shall not operate as a bar, is, that the statute ought not in conscience to run the conscience of the party being so affected that he ought not to be allowed to avail himself of the length of time (?) But, in a court of

law, the statute must necessarily receive a strict construction. The court cannot introduce an exception to the statute which the Legislature has not authorized. In *Evans vs Bichnell* 6 Ves., 174, Lord Eldon, in noticing the position of some of the common law judges in *Paisley vs Freeman*, 3 T. R., 51, that if there was relief in equity, that there ought to be relief at law, observes that it was a proposition excessively questionable, and that it could only have been made from advert-ing to the constitution and doctrine of a court of chancery. * * *

The law of Ohio, like that of New York, contains a saving in favor of infants, femme-coverts, non-residents and persons non compos, but it does not make fraud one of the exceptions. The true inquiry, therefore, at law is when did the cause of action arise, and not when did knowledge of that fact come to the plaintiff, or by what circumstances was he prevented from obtaining the information. There are questions which may be properly addressed to a court of chancery, but of which a court of law is bound to have no knowledge."

We have thus seen that in an action at law under the act of February 13, 1831 (3 Chase, 1768, and under the code before the amendments of April 13, 1867, 64 O. L., page 145), fraudulent concealment of the cause of action did not prevent the running of the statute. *Kern vs Schoomaker*, 40, 331; *Fee vs Fee*, 100, 469; *Lathrop vs Snelbaker*, 6 O. S., 276; *Howe vs Minnick*, 19 O. S., 462. A similar rul-

ing has been made by the court of Exchequer in England. The *Imperial Gas Light & Coke Company vs The London Gas Light Company*, 26 *Eng. Law and Eq.*, 425; *Hunter vs Gibbons*, 1 *Hurl and Nor.*, 479. The last case was an action of trespass or trespass on the case, but the plaintiff was not allowed to reply as an equitable answer. Under section 85 of the common law procedure act of 1854 to a plea of the statute of limitations, that the trespass was under ground, and had been fraudulently concealed from the plaintiff till within the period of limitation before suit, Pollock, C. B., said, "if a man could reply to a plea of the statute that his debtor had prevented him from suing by the fraud, the equitable replication would be as common as the promises of payment which people used to prove before Lord Tenterden's Act."

The Supreme Court in *Howe vs Minnick*, 190 S., 462, in giving constructions to the act of April 13, 1867, says that the terms, "relief on the ground of fraud," are derived from courts of equity, and while we do not say that the clause of the statute in question, under the remedial system of the code is to be confined to cases which were formerly of exclusive cognizance in courts of equity, yet it can be extended to no case in which fraud is not the ground or gist of the action. The gist of the action is not fraud, but the taking of property by force, in respect to which, as constituting a cause of action, the intent with which the act is done is not material.

The Supreme Court continuing

says: "That the view we have as to the meaning of the provision of the statute in question, is in accordance with the legislative understanding is apparent. * * * In the amended section, all of the original section is preserved, and a new provision added, declaring that in an action for the wrongful taking of personal property, the cause of action shall not be deemed to have accrued until the discovery of the wrong doer."

The decision of the court was to the effect, that prior to the act of April 13, 1867, an action for the wrongful taking by force of personal property was barred in four years; and that the fact that the taking was under circumstances constituting larceny, and that the defendant concealed his guilt from the plaintiff, did not prevent the running of the statute.

In *Douglass vs Corry*, 46 O. S., 349, it was held that when an attorney collects money for his client, and uses no fraud or falsehood to him in regard to its receipt, the statute of limitations begins to run from the time of its collection. In that action the court sustained a demurrer to the petition on the ground that the action was barred by the statute of limitations, when it appeared on the face of the petition that the collection was made by an attorney, for a client, more than six years prior to the commencement of the action and in the absence of any averment of any misrepresentation or concealment of its collection by the attorney.

It is true that the decision in

Fee's Administrator vs Fee, 10 O., 470, was rendered at the December Term, 1841, but the reasoning of the court is good so far as the case at bar is concerned. While there may have been amendments to the act of April 13, 1867, now section 4982 of the Revised Statutes relating to the discovery of fraud, yet section 4983 declares in express terms that an action for libel or slander shall be commenced in one year. In a court of law the statute must receive a strict construction, and an exception can not be introduced which the Legislature has not authorized.

The demurrer to the amended petition will be sustained and the petition dismissed.

Brown & Hofheimer for the demurrer; Heintz contra.—Court Index—Cin.

Sixth Judicial Circuit.

ATTACHMENT.

Proceedings Before a Justice. Facts Examined by the Circuit Court.

(Wood County Circuit Court—April Term 1894. Present: Hons. C. S. Bentley, P. J.; Chas. H. Scribner, James H. Day, J. J.).

James S. Hoyman vs John V Beverstock, et al.

(Attachment is an extreme remedy and the attaching creditor must bring his case within the letter of the law to secure such remedy or take the property of the debtor from his possession before judgment.)

The Circuit Court has power and will look into a bill of exceptions in such a case for the purpose of ascertaining whether the order of a Justice of the Peace was sustained by sufficient evidence or not.—(ED. LEGAL NEWS).

BENTLEY, J.

On June 16, 1893, Mr. Hoyman began an action to obtain a personal judgment against the defendant, Mr. Beverstock, and obtained an attachment upon which certain property

was attached. Afterwards Mr. Beverstock presented a motion before the Justice of the Peace for an order discharging the attachment on the ground that the statements in the affidavit for the attachment were untrue, as well as on the ground that said affidavit was insufficient. The creditor sought and obtained leave from the Justice to file an amended affidavit for attachment, and filed such amended affidavit. The motion coming on for hearing still upon the application to discharge the attachment, evidence was introduced both by way of affidavit and by way of oral examination of witnesses under oath by both parties. The Justice upon the final hearing of that motion refused to discharge the attachment; a bill of exceptions showing the evidence was allowed, and a petition in error being filed in the Court of Common Pleas; that court found, upon the facts shown in the bill of exceptions, that the conclusion of the Justice was erroneous; that the attachment should have been discharged, and ruled accordingly.

This action is brought here in the Circuit Court to reverse the judgment of the Court of Common Pleas, and the same bill of exceptions is before us.

It is held in a case found in the First Ohio Circuit Court report on page 78 in the case of the *U. Rolling Mill Co. vs Packard, et al.*, that an attachment is an extreme remedy and the attaching creditor must bring his case within the letter of the law to get "the strong arm of the court" to take the property of

the debtor from his possession before judgment.

We are disposed to follow that rule of the Circuit Court and to examine this report with reference to finding whether or not it presents facts showing sufficiently that Mr. Beverstock intended by the action which was charged against him to commit a fraud upon his creditors. It is said that a Circuit Court has held that the Circuit Court has no power to and will not look into a bill of exceptions in such a case for the purpose of ascertaining whether the order of the Justice was sustained by sufficient evidence or not, and it quotes the case found in the 46 O. S. page 52 as holding that the record ought not to be looked to for such a purpose as was stated by the counsel who called our attention to it. It was evidently an inadvertance on the part of the Circuit Court in so holding. It rested its decision upon a case found in the 46. O. S. In that case the Supreme Court was determining the case under its rules of practice and under the statute applicable to it alone, being that section which provides, in substance, that the Supreme Court will not be required to look into a record for the purpose of determining any question on the weight of evidence.

The Supreme Court held that it would not in that case go into that question. No such definite law and no such definite rule applies to the Circuit Court, and we think it is as entirely competent for the Circuit Court to look into the bill to determine that question, as it

was for the Common Pleas to inspect it for the same purpose. The record simply presents this question: whether these affidavits and this testimony, fairly considered, sufficiently indicated that Mr. Beverstock attempted to commit a fraud against his creditors with respect to his property, and justified the beginning and sustaining of an attachment against his property. The Common Pleas Court thought the record did not so show, and without reviewing the testimony in great detail we think that the judgment of the Common Pleas Court was correct on the subject, and that of the Justice erroneous. I will merely refer to the one circumstance which seemed to be regarded by counsel as the one most indicating such fraud.

Mr. Beverstock having a banking institution at Weston in this county, became hard pressed and unable on a certain day to pay his depositors. Sometime prior to that he had received from a lady, a relative of his wife, \$350, in money for which he issued and sent to her a certificate of deposit in the bank. This was some time, perhaps about a year, previous to the action I have spoken of. It is shown that at this time she told him that if at any time there was a difficulty liable to happen as to her getting the money, she wanted that he should send her the money. Whether she apprehended any difficulty or not is not shown, but it seems that a few days prior to the attachment suit, she sent him by mail this certificate of deposit for

\$350, and requested that he send her the money. He put it in his pocket and being in the bank and having it with him, and having on deposit in this bank draft for \$350, he took the certificate of deposit which she had sent him, placed it upon the wire as redeemed and cancelled, took the \$350 draft and put it in his pocket for the purpose, he says, of sending it to her and had it in his pocket at the time this attachment was begun, not having had opportunity, up to that time, to send it to her, but so far as his intention goes, he had appropriated it for that purpose.

The question presented here is whether that was necessarily a fraudulent transaction, —an act due with intent to defraud, and looking over the whole testimony as to the transactions of the day, and taking them all into consideration, we think the Court of Common Pleas was justified in finding that there was no such intent. It does not necessarily follow that the draft is the property of the lady mentioned nor that it should not go in to the assignee of Mr. Beverstock. We make no finding and express no opinion as to that and are not called upon to do so. We simply think that it did not indicate a fraudulent act which would sustain an attachment of the man's property. Judgment of the Common Pleas Court will be affirmed with the usual judgment and costs on error.

Baldwin & Harrington, attys for plaintiff in error.

T. N. Bierly, atty, for defendants in error.

- DIRECTING VERDICTS.

Court has Power Only When There is Total absence of Proof of Material Facts.

(Wood County Circuit Court—April Term, 1894—Present: Hons. C. S. Bentley, P. J.; C. H. Scribner and J. H. Day, J. J.)

Geo. S. Clark vs Wm. Stitt, et al.

(When, in the delivery of a case to the jury upon the issues generally there is some testimony tending to prove each of the material averments of the petition the court is not at liberty to direct a verdict, and the party is entitled to the opinion of the jury upon the facts tending to prove his case. This is true even though the showing is so slight that the court would feel called upon to set aside a verdict rendered upon such insufficient testimony.—ED. LEGAL NEWS.)

DAY, J.

Error to the Common Pleas of Wood County.

The case was for damages on account of personal injury resulting from the alleged carelessness of defendant, by their foreman, conducting the operations of drilling, tubing and piping of an oil well; negligence in construction of the derrick and in several other regards was claimed in the petition.

The case was tried by a jury and after the plaintiff had introduced his testimony and rested his case, the Court of Common Pleas, on motion, directed the jury to return the verdict for the defendants, no cause of action; which was accordingly done. A motion for a new trial was overruled and judgment entered on the verdict dismissing the petition of the plaintiff and rendering judgment in favor of the defendants for the costs.

All the testimony is brought here by a bill of exceptions and a petition in error is presented in this Court to reverse the judgment of the Common Pleas Court. In the petition in error there are five as-

signments of error. First, that the Court erred in directing the verdict for the defendants; second that the Court erred in this charge to the jury; third, in refusing a new trial on motion. There are two other assignments, but they both merge and become substantially one and that is a complaint that the Court erred in directing a verdict for the defendants.

The rule obtaining in such case has been stated by the Supreme Court of this State a number of times and presumably is well known and understood by the lawyers. The rule is that when in the delivery of the case to the jury upon the issues generally there is some evidence, some testimony tending to prove each of the material averments of the petition, the Court is not at liberty to direct a verdict and the party is entitled to the opinion of the jury upon the facts tending to prove his case and that is so even if the showing is so slight that the Court would feel called upon to set aside a verdict for the plaintiff rendered upon such insufficient testimony. It is only, we take it, where there is a total failure of proof, total absence of proof upon some one or more of the material averments in the petition of facts necessary to be established, that the court is authorized to direct a verdict for the defendant.

In this case there were two material questions at issue between plaintiff and defendant; the question of an act of negligence on the part of the defendant in a number of particulars; and whether their agent,

who was in command as was claimed in the petition, was a superior of the plaintiff as to the work they were doing. On these two questions there was much shown and as I say there was 5 or 6 specifications in which it was claimed there was negligence.

An examination of this bill of exceptions, compels us to say that as to some, at least, of these averred acts of negligence there was some evidence before the jury tending to establish them. The same may be said with reference to the question of superior and inferior. There was some evidence tending to prove that the relation between the said agent of the defendants and the plaintiff was that of superiority and inferiority; how much evidence or the extent of it, or whether warranting a finding against the defendants or not, it would be improper for this Court to say now. We only announce that there was some evidence produced to the jury on this trial having a tendency to prove each and all of such averments in this petition as are necessary to state a cause of action. That being true, the Court was not at liberty, had no right to take the matter from the consideration of the jury and direct a verdict for the defendants. It follows that the Court erred in this action in that respect. The judgment will be reversed and the motion for a new trial will be allowed, verdict set aside and new trial granted at the costs of the defendants in error. Judgment against the defendants in error for costs on error, execution awarded, and case

remanded to the Court of Common Pleas for new trial and further proceedings according to law. A special mandate is also ordered sent to the Court of Common Pleas for execution for costs.

Baldwin & Harrington, attorneys for plaintiff in error.

George H. Phelps & J. O. Troup, attorneys for defendants in error.

CONDEMNATION.

Compensation for Property Taken by Municipality for Street Purposes.

(Probate Court, Lucas County.)

City of Toledo vs John G. Bayer.

(Construction of laws relating to appropriation of private property by municipal corporations for street purposes. The passage of the ordinance by the council places the municipal corporation in as advanced a state of procedure as a private corporation would be in after the court had determined the jurisdictional questions provided by statute as a basis for such proceedings by private corporations; and when a municipal corporation has passed an ordinance appropriating property to its own use, compensation therefor, and decrease of the value of the remainder, if any, should be made as of the date of the passage of the ordinance; and if the owner, to whom compensation is to be made, uses the property within the boundary lines of a proposed street opening after the passage of the ordinance to appropriate for such purposes, he does so at his own risk and cannot recover for any improvements or erections placed thereon after the passage of such ordinance.—ED. LEGAL NEWS.)

MILLARD, J.

October 2d, 1893, the Common Council of the City of Toledo passed an ordinance to condemn certain property, fully set out in said ordinance and in the application filed in this court, to open Islington street from Cherry street to Fulton street, etc.

A portion of this property was owned by the defendant, John G. Bayer, and was then, and is still, used by him in his business of florist and market gardener. Some time during the months of October or November 1893, and after the passage of the above ordinance by the City council, Defendant Bayer took down certain hot-houses or green houses, which stood partly on the land proposed to be taken by the city, and partly on the adjacent land owned by defendant and re-

constructed them—one entirely on the land proposed to be taken by the city and the other with some five or six feet of its entire length upon such land, or within the line of the proposed street.—The first is known in this proceeding as the "Parsley House" and the second, or one partly within the lines of the proposed street, as the "Violet House."

An old boiler was also brought from some other point and placed in the boiler house within the lines of this proposed street.

Upon inquiry as to the value of this boiler, objection is raised by the counsel for the city, who make the claim that the City of Toledo, when it passed the above ordinance, thereby appropriated said property to its own use, and that compensation is to be made by the jury for property taken and decrease of value of the remainder, if any, as of the date of the passage of that ordinance. That if the owner to whom the compensation is to be made, uses the property within the boundary lines of a proposed street-opening after the passage of an ordinance to appropriate for such purpose, he does so at his own risk and cannot recover for any improvements or erections placed thereon after the passage of such ordinance.

In considering this question it is necessary to keep in mind that actions by municipal or public corporations are governed by a distinct and separate provision of the constitution from those by private corporations and that many requirements of the statutes authorizing appropriations by private corporations, as rail roads etc., do not apply in cases by municipalities.

Sec. 19, Art. 1, Constitution provides that "private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public without charge, a compensation shall be made to the owner in money; and in all other cases where private property shall be

taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury; without deduction for benefits to any property of the owner.

It is under this article of the Constitution of Ohio, that these proceedings in which we are now engaged, are brought. Proceedings of like nature by private corporations are maintained by virtue of Sec. 5, Art 13 Constitution, which reads as follows:

"No right of way shall be appropriated to the use of any corporation, until full compensation therefor be first made in money to the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury of twelve men, in a court of record, as shall be prescribed by law."

Under the power conferred by the constitution the legislature has passed a code of laws pertaining to appropriation proceedings, and while the acts under the different sections of the constitution are distinct, the provisions for appropriations by private corporations appear to have received more careful consideration or definite expression, of the lawmakers, and the duties of the appropriating party are more clearly and fully set out in the statutes, than those of public or municipal corporations.

By looking at some of the provisions for private corporations we get some light, perhaps, on the more obscure portions of those governing the public corporations.

By referring to Tit. II, Chapter 8, of the Revised Statutes—being the div. relating to appropriation of property—we read.

SEC. 6414. Appropriations of private property by corporations must be made according to the provisions of this chapter.

SEC. 6415 Says what shall be done when corporations cannot agree with owner.

SEC. 6416 Provides for filing a petition with court, when parties cannot agree

and what it shall contain, and requiring that the same close with a prayer for the appropriation of the property.

SEC. 6417 Provides for cases when property lies in two or more counties.

SEC. 6418 Provides for summons and service on parties, and 6419 for method of service upon non-resident owners and for time of hearing.

SEC. 6420. On the day named in any summons first served, or publication first completed, the Probate Judge shall hear and determine the questions of the existence of the corporation, its right to make the appropriation, its inability to agree with the owner, and the necessity for the appropriation.

Upon these questions the burden of proof shall be upon the corporation, and any interested party shall be heard.

SEC. 6421 Provides for order to clerk and sheriff to draw sixteen names from the jury box etc.

The succeeding sections provide for trial, amendments, adjournments, filling of panel, challenges, oath to jurors, view of premises, papers to go with jury, witnesses, proceeding when structure is partly on land sought to be appropriated, verdict, when and how corporation may have possession, when and how corporations may abandon proceeding, and when action may be brought for costs and expenses.

SEC. 6436 Provides for new trial, and the subsequent sections relate wholly to independent matters, and SECTION 6448 gives owner the right to institute proceedings to condemn when corporation has taken possession and is using land which has not yet been appropriated.

SEC. 6453 Is the last of the chapter on appropriations and is as follows:

The provisions of this chapter shall not apply to proceedings by state, county, township, district or municipal authorities, to appropriate private property for public use, or for roads or ditches; and in all such cases it shall be optional with such authorities to pay the judgment rendered against them according to section *sixty-four hundred and thirty-two*, or to pay

the costs and decline to take the property sought to be appropriated.

SEC. 6452 Referred to in last above reads as follows:

The jury shall render its verdict in writing, signed by its foreman, to the Judge, who shall cause it to be entered on record; and unless for good cause shown, upon motion to be filed within ten days after the verdict is rendered, a new trial be granted, the Judge shall enter a judgment confirming such verdict. Q

The foregoing is the general law regulating appropriations, and is varied only by special statutes which we will consider later.

TURNING TO TIT. XII, DIV. 7 CH. 3, relating to "appropriations by cities and villages of private property to public use."

SEC. 2232. Each city and village may appropriate, enter upon and hold, real estate within its corporate limits for the following purposes, but no more shall be taken or appropriated than is reasonably necessary for the purpose to which it is applied: 1. For opening, widening, straightening and extending streets, alleys and avenues; and for 20 other purposes.

SEC. 2232 Gives power to appropriate for opening streets across railroad tracks etc.

SEC. 2234. No improvement requiring proceedings for the condemnation of private property shall be made without the concurrence in the by-law, ordinance or resolution directing the same, of two-thirds of the whole number of the members elected to the council. (66 V. 236.)

SEC. 2235. When it is deemed necessary by a municipal corporation to appropriate private property, as hereinbefore provided, the council shall, by resolution, declare such intent, defining therein the purpose of the appropriation, and setting forth a pertinent description of the property designed to be appropriated; and on the passage of such resolution, the yeas and nays shall be taken and entered on the record of the proceedings of the council. (66 V. 236.)

SEC. 2236. Upon the passage of the

resolution by the requisite majority, application in writing shall be made to the Court of Common Pleas of the proper county, or to a Judge thereof in vacation, or to the Probate court of the county, which application shall describe as correctly as possible, the property to be taken, the object proposed, and the name of the owner of each lot or parcel of the property. (66 V. 236.)

This section of the statute, when compared with section 6416, providing for appropriation of property by Private Corporations, shows the indefiniteness before mentioned, of the provisions of the distinct acts, which characterize the statutes for appropriation by Public Corporations, or those under Sec. 19, Art. 1, Constitution.

By SEC. 6416 The Appropriating corporation is compelled to file a petition, duly verified; a special description of the property sought to be appropriated, the work to be constructed thereon and sundry other matters, and to wind up with "a prayer for the appropriation of the property."

While by this section 2236 the only requirement is that application in writing shall be made to the Court of Common Pleas, or a Judge thereof in vacation, or to the Probate court of the county, which application shall describe as correctly as possible, the property to be taken, the object to be proposed, and the name of the owner of each lot or parcel of the property.

A very few words more, providing for a prayer of their desire, would have saved much perplexity.

SEC. 2237 Provides for notice to be given personally in the ordinary manner of legal process, to all owners or agents resident within the state whose place of residence is known, and for publication to others etc. of the time and place of making the application provided for in Sec. 2236.

SEC. 2238 If it appear to Court or Judge that such notice has been served five days before the time of application, or has been published as provided in the preceding section, and that such notice

is reasonably specific and certain the Court or Judge may set a time *for the inquiry into and assessment of Compensation* by a jury of twelve men, unless all the parties agree upon a less number, who shall be duly sworn to discharge that duty. (66 V. 236.)

SEC. 2240 Provides for drawing a jury, filling pannel from bystanders, etc.

SEC. 2241 Provides "the inquiry and assessment shall be made at the time appointed, unless for good cause, continued to another day."

SEC. 2242 Provides for a view of premises by jury.

SEC. 2243 Provides for the appointment of guardian *ad litem* in proper cases.

SEC. 2244 For a more full and accurate description of lots etc., when desired.

SEC. 2245 For mode of assessing by jury and opening and closing case by counsel and other rules.

SEC. 2246 Relates to a verdict in whole or in part.

SEC. 2247 When the assessment has been made by the jury, the Court shall make such order as to payment or deposit by the Corporation as may seem proper; such order shall designate the time and place of payment or deposit, the person entitled to receive payment, and the proportion payable to each; and the Court may require adverse claimants for any part of the money or property, to interplead, and fully determine their rights in the same proceeding.

SEC. 2248. The Court may direct the time and manner in which possession of the property condemned shall be taken or delivered, and may, if necessary, enforce and order giving possession. Other sections down to 2260 provide for special features, error, appeal & etc., but

SEC. 2260 provides that, when a municipal corporation makes an appropriation of land for any purpose specified in this chapter, and fails to pay for or take possession of the same within six months after the assessment of compensation shall have been made, as hereinbefore provided, the right of the corporation to make such appropriation on the terms of the assessment so made, shall cease and

determine; and any land so appropriated shall be relieved from all incumbrance on account of the proceedings in such case, *or the resolution of the council making the appropriation*; and the judgment or order of the court, directing such assessments to be paid, shall cease to be of any effect, except as to costs adjudged against the corporation.

By reference to chapter 13 Div. 8 Tit. XII being the chapter relating to Streets. We find the latest of the laws affecting street openings.

SEC. 2642. When it is deemed necessary by the council of any municipal incorporation to open, extend, straighten, narrow or widen any street, alley, or public highway within the limits of such corporation, the council shall provide by ordinance for the same; such ordinance shall briefly, and in general terms, describe the property, if any, to be appropriated for such purposes; and the proceedings for such appropriation shall be as provided in chapter three; division seven of this title, (70 V. 127).

This last Section, 2642 is at variance with sections 2234 and 2235 of the general provision of chapter 3, division 7, but the usual and well known rule applies here, for construing statutes, that when there is a general provision in regard to the method of procedure regarding several subjects, followed by a special provision as to the procedure in regard to one or more of the subjects, the special provision will govern.

We see by this review of the statutes, and the constitutional provisions on which they are founded that widely different action by or in court is required when a municipal corporation seeks to take private property from what is required of a private corporation.

Should a Rail Road Company, for instance, desire to take for a right of way this same property now sought for Islington street, it would have to file a duly certified petition, with proper prayer &c. Then would follow proof to court of the Legal Existence of the Corporation desiring to appropriate; its right to make the appropriation; its inability to agree with

the owner, and the necessity of the appropriation.

In establishing these four jurisdictional facts, the burden of proof would be on the corporation, and any interested party would have a right to contest any or all, and should the corporation fail to show to the Court of the existence of any of these, it would fail to make its case and the action would be dismissed by the court.

In the case now before us, of the municipal corporation desiring this same property for a public road, none of these jurisdictional facts or the preliminary steps leading up to the action of the court are left to the discretion of court; but on the contrary the right, the necessity, and the inability to agree are all determined by the common council before applying to court. The council provides for the appropriations by ordinance, briefly and in general terms describing the property required.

The passage of the ordinance by the council places the municipal corporation in as advanced a state of procedure at least as a private corporation would be after court had determined in its favor the jurisdictional questions. The next step for the municipal corporation is to file an application, instead of a verified petition, with court, in which shall be described as correctly as possible the property to be taken, the object proposed, and the name of the owner of each lot or parcel of land, and a subsequent provision is made for notice to parties of time of hearing. The first action required of court is when, as provided in section 2238. If it appears to court or judge that the requisite notice has been given parties five days before the time of application, or publication duly made, and that such notice is reasonably specific and certain, the court may set a time for the *inquiry into and assessment of compensation* by a jury of twelve men, unless all parties agree upon a less number. In case of a railroad or other private corporations the law requires sixteen names drawn from jury box, and so, as all though, there is a perfect separation of requirements as to the two classes of corporations.

After the submission to the jury and

verdict rendered the divergence between the two classes of corporations is even more marked. In the case of private corporations appropriating property, the court has nothing to do with contesting claimants to the land or proceeds of property appropriated, while in the case of the municipal corporation, the court can order as to the payment or deposit of money as it sees fit and can order adverse claimants to interplead and fully determine their rights in the same proceeding. The court can also direct the time and manner of taking possession of the property and enforce its orders as to possession.

If no order is made the municipality must take the property within six months after the assessment of compensation or its rights cease and determine, and in the language of section 2260, any land so appropriated shall be relieved from all incumbrance on account of the proceedings in such case, *or the resolution of the council making the appropriation.*

I have dwelt on the provisions of the constitution and the appropriation statutes thereunder, as they are the source of all rights and obligations, and because so very few decisions have been made on the point involved by courts of Ohio.

The determination of courts of other states can help us but very little, as we know not their constitutional or statutory provisions. My study has carried me clear from my former ideas on the effect of the ordinances passed by the council and of the part the court had to do in appropriation cases; and as I now read section 19 art. 1 constitution, and the sections of the statutes regulating the appropriations by municipal corporations, a new light is given and much that was before ambiguous disappears. By dropping out of the constitutional provision the words not necessary in this particular case, it will read, "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war, or for the purpose of making or repairing roads, which shall be open to the public without charge, a compensation

shall be made to the owner in money."

That the law makers have considered that when a municipal corporation wanted land for opening a street, & etc., they appropriated it by resolution or ordinance duly passed by the council for that purpose is apparent in all the acts regulating the subject, and that the jury provided for is only required to assess the compensation for such property so appropriated is equally clear. Read portions or all of a few sections in this point of view.

SEC. 2232. Each city and village may appropriate, enter upon and hold real estate within its corporate limits * * * for opening, widening, straightening and extending streets, alleys and avenues.

SEC. 2235. When it is deemed necessary by a municipal corporation, to appropriate private property * * * the council shall, by resolution declare such intent, defining therein the purpose of the appropriation, & etc.

SEC. 2238. If it appears to court * that notice has been served five days before the time of the application * * *

* * the court or judge may set a time for the inquiry into and assessment of compensation by a jury etc.

SECTION 2260. When a municipal corporation makes an appropriation of land * * * and fails to pay for or take possession of the same within six months after the assessment of compensation shall have been made * * * the right to make such appropriation on the terms of the assessment * * shall cease and determine, and any lands so appropriated shall be relieved from all incumbrance on account of the proceedings in such case, or the resolution of the council making the appropriation.

That this was the view taken by Judge Saylor, of the Hamilton County Common Pleas Court, is evident from his decision in *Cincinnati vs Stribly*, 30 *Weekly Law Bul.*, 249. When he says, "In an action to assess the compensation to property owners for the appropriation of their property by municipal corporations for public street purposes, compensation shall be awarded for its value at the time of the passage of the condemnation ordinance.

The same line of determination is recognized in the discussion by court in the case of *Taylor vs The City of Columbus*, by Franklin County Circuit Court, at January term 1892, 6 Cir. Court reports 224. As to the contention of counsel, that this view is wrong because "it would be taking the property from a citizen without his having his day in court," we find that this view was discussed and decided in the case of *Strauss vs Cincinnati*, reported in 24 *W. L. B.* 422, Superior Court of Cincinnati, as was the same question by Judge Taft in the case of *Singorith vs Cincinnati*, reported in 23 *W. L. Bul* page 101.

The subject of the constitutionality of this mode of taking property is also discussed and upheld in the case of *Caldwell vs Village of Carthage*, 49 *O. S.*, rep. 354 and is there held that this is not a "taking of property without due process of law."

If these views are right the City appropriated this property for Islington street opening, on October 2nd, 1893, and improvements made thereon after that date were so made at the risk of the party so placing them. While this view may work a hardship for the owner, the same will arise, not from the fault of the law as interpreted by our courts, but from the owner not understanding the law, and as I see no way to avoid this conclusion, compensation will be awarded as of October 2nd, 1893.

SUPREME COURT NEWS.

COLUMBUS, O., JUNE 5, 1894.

The following causes were filed in the Supreme Court last week and the first two days of this week:

4048—The C & C Ry Co. vs Noah Mast. Error to the Circuit court of Tuscarawas county. Baldwin & Shields, Canton, for plaintiff; Richards & McCullough, New Philadelphia, for deft.

4049—Jones, Witter & Co. et al vs Mrs. J. B. Starffer. Error to the Circuit court of Wayne county. Powell, Rickets & Black, Columbus, Johnson & Taylor, Wooster and S. N. Coe, Orrville, for plffs; McClure & Smyser, Wooster, for deft.

4050—Albert Shaw vs The Prudential Ins Co. of America. Error to the Circuit court of Montgomery county. John M. Nutt and Munger & Kennedy, Dayton, for plff; O. F. Davisson, Dayton, for deft.

4051—Walter C. Ong and Francis C. McMillen, formerly partners as Ong & McMillen vs Charlotte Worden. Error

to the Circuit court of Cuyahoga county. W. S. Kerruish, Cleveland, for plffs; J. E. Ingersoll, Cleveland, for defts.

4052—John W. Calvert vs Lizzie M. Russell, William C. Wood and Ralph Ricketts. Error to the Circuit court of Morgan county. Ball & Ivers McConnellsville, for plff; Berry & Webber, McConnellsville, for defts.

4053—The Tol Con St Ry Co. vs Thomas Sweeney, The L S & M S Ry Co. and The city of Toledo. Error to the Circuit court of Lucas county. Baker, Smith & Baker, Toledo, for plff; John F. Kumler, Frank H. Hurd and O. S. Brumback Toledo, for defts.

4054—The Tol Con St Ry Co. vs The Tol Elec St Ry Co. Error to the Circuit court of Lucas county. Baker, Smith & Baker, Toledo, for plff; John F. Kumler, Frank H. Hurd and O. S. Brumback, Toledo, for defts.

4055—John T. Crabbs vs Smith & Ozier, John E. Smith and John N. Crabbs Error to the Circuit court of Richland county. Donnel & Marriott, Mansfield, for plff; Skiles & Skiles, Shelby, for defts.

4056—Upsom Coal Co. vs Annie Peterson, admx, etc. Error to the Circuit court of Perry county. J. B. Jones, Newark, and Ferguson & Johnston, New Lexington, for plff; Butler & Butler and W. T. Lewis, New Lexington, for defts.

4057—John H. Cox vs Mary A. Rose, Otho K. Cox and Catherine Cox. Error to the Circuit court of Richland county. W. S. Kerr, Mansfield, for plff; W. S. Kerr, Bradford & Moorhouse and D. Dirham, Mansfield, for defts.

SUPREME COURT PROCEEDINGS.

Causes up to and including No. 3075 on the General Docket are called and submitted.

TUESDAY, June 5, 1894.

General Docket.

2403—John B. Mannix et al, vs Isaac J. Miller et al, Trustees. Error to the Circuit court of Hamilton county. Judgment affirmed.

2423—John B. Mannix et al, vs Isaac J. Miller et al, Trustees. Error to the Circuit court of Hamilton county. Judgment affirmed. Dickman, C. J. and Spear, J., dissent.

2431—Wesley M. Cameron vs The Village of Winton Place, etc. Error to the Circuit court of Hamilton county. Judgment affirmed.

2444—Milton Sater, Adm'r etc, vs Geo. Kocher. Error to the Circuit court of Hamilton county. Judgment affirmed.

2834—William H. Campbell vs Samuel B. Woodward. Error to the Circuit court of Warren county. Judgment affirmed.

Dickman, C. J., and Burket, J., dissented. 2873—J. H. Hillerman vs M. A. Pounds, Sheriff etc. Error to the Circuit court of Cuyahoga county. Judgment affirmed.

2876—Elizabeth L. Miller vs Margaret K. Atherton. Error to the Circuit court of Licking county. Judgment affirmed. Williams and Minshall JJ., dissent.

2897—Thomas B. Gilbert et al, vs Geo. H. Lewis et al, Partners. Error to the Circuit court of Hancock county. Judgment affirmed.

2903—Williams Rush et al, vs John Rush et al. Error to the Circuit court of Ashland county. Judgment affirmed.

2905—Joseph B. Brubaker vs Walter McGuire. Error to the Circuit court of Ashland county. Judgment affirmed.

2906—Sumuel Slawson, Adm'r. vs Asa A. Gardner, Adm'r. Error to the Circuit court of Morrow county. Judgment affirmed.

2921—Elmer E. Black vs Mary V. Herbert et al. Error to the Circuit court of Columbiana county. Judgment affirmed.

3227—The Toledo Consolidated St. Ry. Co. vs The Toledo Electric St. Ry. Co. et al. Error to the Circuit court of Lucas county. Dismissed by consent of parties at costs of plaintiff.

3273—The Tuscarawas Valley Coal Company vs Thomas E. Beans. Error to the Circuit court of Tuscarawas county. Dismissed at costs of plaintiff by consent.

3935—Joseph S. Tilden et al. vs Charles C. Reid. Error to the Circuit court of Portage county. Dismissed for failure to file printed record.

3946—The Pittsburgh & Wheeling Coal Co. vs Gustave Estievenard. Error to the Circuit court of Belmont county. Dismissed for failure to file printed record.

Motion Docket.

2141—The Wabash Railroad Co. vs The City of Defiance. Motion by plaintiff for injunction in cause No. 3965, on the General Docket. Motion allowed, the plaintiff to give bond in the sum of \$10,000 to the satisfaction of the Clerk of the court.

2178—The Mt. Adams & Eden Park Inclined Railway vs Daniel Peppard. Motion by plaintiff to re-instate cause No. 2927, on the General Docket. Motion allowed.

2179—John A. Romans vs the State of Ohio. Motion by plaintiff to advance cause No. 3779, on the General Docket. Motion allowed.

2181—The Wabash Railroad Co. vs The City of Defiance. Motion by deft to advance cause No. 3965, on the General Docket. Motion allowed.

2182—B. J. Redmond vs The Harris Stove Pattern & Machinery Co. Motion by plaintiff to re-instate cause No. 2840, on the General Docket. Motion overruled.

Toledo Legal News.

OFFICIAL LAW JOURNAL OF LUCAS COUNTY, OHIO.

In the matter of the designation of a daily Law Journal in Lucas County. As required by Sec. 1 of an Act passed April 14th, 1884 and amended Feb'y 25, 1886, entitled "An Act relating to the posting of court calendars and legal notices in certain counties," as amended May 9, 1894, the Judges of the Courts of Record in said County other than the Circuit Court, hereby jointly designate the TOLEDO LEGAL NEWS, a daily law journal published in said County, as the journal wherein until the further order of said Judges, shall be published all the notices, advertisements, abstracts and matters and things specified or referred to in said Section 1.

Approved { GILBERT HARMON,
REUBEN C. LEMON,
ISAAC P. PUGSLEY,
Judges of Common Pleas.
I. L. MILLARD, Probate Judge.

Weekly edition, \$3.00 Per Year, payable quarterly in advance. On trial for three months, 75c.
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A. L. SLEPPER, Editor.
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SATURDAY, JUNE 16, 1894.

NOBLESSE OBLIGE.

A species of journalism, unique to say the least appeared in the last issue of the Weekly Law Bulletin. We refer to the following magnanimous remarks which were appended to the Editorial comments of the Law Bulletin on Judge Ricks' decision; "As we had to pay \$11.70 to the Clerk of the U. S. Circuit Court at Cleveland, to promptly secure a copy of the decision in the case of *Meyers vs Shields*, on account of its great importance, we would rather not see other papers reprint this decision from the Bulletin."

Coming from a Journal which subsists, very largely upon matter taken from other Law Journals, and for which no credit is ever given, such a request is a most remarkable exhibition of ignorance, or cheek, or both.

In the same issue of the Law Bulletin there are two Circuit Court decisions, from Wood County, taken bodily from the LEGAL NEWS, and unblushing published without the slightest reference to our paper. This piratical policy has been practiced upon us, by the Law Bulletin,

ever since our paper was started, and always without giving us credit, in any manner, for the decisions.

Even matters which were handled in an Editorial manner in the LEGAL NEWS became prey for the Law Bulletin and appeared verbatim, but without credit.

We have not, so far, had occasion to use anything from the Law Bulletin, but we have printed a large amount of valuable matter from other Law Journals; not, however, without, in every instance, giving them credit for such decisions as were taken from their columns.

Still the Editor of the Law Bulletin is evidently alarmed about that eleven dollar case.—The novelty, and expense, of getting a decision in a legitimate manner has jarred our esteemed contemporary into a childish and unnecessary request. We publish the decision, for which he paid *eleven dollars and seventy cents*, in his number of the LEGAL NEWS, but we did not take it from the Law Bulletin. It came to us last week, through the courtesy of U. S. Court officials, but as we had other matters in type, it was necessary to delay publication for a week. At that time we did not, of course, know that the Law Bulletin was living through the ordeal of *paying* for a decision; in fact our observation had led us to believe said journal would not deem it necessary to do more than copy it from our paper or some other Law Journal and offer it then as matter secured by and belonging to itself; but, shades of Cicero, it paid *eleven dollars and seventy cents* for the decision and now would not like to see it published in any other paper. All other journals should suspend business at once, or concede to the Law Bulletin its imaginary copy right, and allow it to go on offering stolen stuff as its own without objection.

The policy of the Law Bulletin is not legitimate journalism in any field. There is, throughout the country, on the part of reputable publications, a continual protest against such disreputable methods, but to a certain class of publications, "professional courtesy," is, will always be an abstruse term. Fortunately, however, the practice of copying, without giving credit,

eventually brings its just reward. With an intelligent people it stamps the guilty publication as unreliable, as well as despicable. No intelligent editor presumes that subscription or exchange with another publication gives him a right to republish its contents as his own, at least, for use in the same or the ordinary form.

Our practice and policy has been and will continue to be, simply this: All decisions purporting to be our own are taken by expert stenographers; and we pay for them, sometimes considerably more than *eleven dollars and seventy cents*. Decisions or clippings from other Law Journals are credited to the proper papers; We do this, not only in justice to others but in justice to ourselves; our own decisions are correct, we know; those taken from other publications we believe to be equally reliable, but we do not offer them as our own and believe our subscribers have a right to the authority on which we base the publication of them.

An opinion by Mr. Justice Grant, Supreme Court of Michigan, in *Globe Iron Works Co. vs. Steamer J. B. Ketcham*, 2d, was filed June 2d. The action was a proceeding to enforce a lien under the water craft law of Michigan, which is similar to the water craft law of Ohio, for boiler and attachments, etc., furnished and used in building and equipping the steamer J. B. Ketcham 2d. The defense, by demurrer, was that the complaint did not set forth a cause of action cognizable by the State Court and could only be maintained in a Court of Admiralty. The Court said, in part: "The fundamental error on the part of the defendant lies in the apparent assumption that the machinery in the present case was furnished under a maritime contract. Whatever may once have been the rule, it is now established beyond controversy that contracts for the construction of vessels and for the furnishing of materials therefor, before they are launched, are non-maritime, and that liens and proceedings to enforce such liens are under state control, and may be enforced in State Courts. The latest

enunciation of the doctrine by the Supreme Court of the U. S. is found in the case of *J. E. Rumbell*, 148 U. S. 11, where it is said "It is now settled that a contract for building a ship, being a contract made on land, is not a maritime contract, and that a lien to secure it given by a local statute, is not a maritime lien, and cannot therefore be enforced in Admiralty.

The Supreme Court of New Hampshire in the celebrated *Almy Case*, recently reported in 22 L. R. A. 744, decided that the constitutional right of trial by jury was not violated by a statute authorizing the court, without a jury, to determine the degree of the crime on a plea of guilty of murder. The court said, "It is enough that the legislature, in the exercise of the power with which it is invested by the Constitution, has provided, at the option of the accused, a mode of trial in capital cases without the intervention of the jury, and that the defendant has availed himself of the option."

The question of admitting evidence of the payment of the similar claim of a third person as an admission of liability on a claim in suit is discussed at length by Chief Justice Doe in a New Hampshire case, *Colburn vs. Croton*, 22 L. R. A. 763, in which it is decided that the admissibility of such evidence is a preliminary question of fact for the presiding justice, depending on the question whether it was paid as an admission of liability or whether the object of payment was to buy a peace that would cost less than litigation.

The examination from libel for libel or slander in respect to words used in a judicial proceeding is applied in *Cooper vs. Phipps*, 22 L. R. A. 836; to the language of a witness, and a note to the case shows the general doctrine of the authorities—that the testimony of a witness is privileged so long as it is pertinent to the case.

U. S. Circuit Court.

June Term—Judge Ricka Presiding.

Filings.

1070—Eli Albaugh vs B & O R R Co. Praecipe for witness. Bowen & Reiter, attys.

The case of Craig vs L E & W R R Co. went to the jury yesterday afternoon at 4 o'clock. At a late hour last night they had not agreed.

Toledo vs Burwell will be taken up this morning. The case will probably occupy the day and a portion of Monday.

1172—L. Sr Langabaugh et al vs S. A. Baxter. Stipulation of dismissal.

1223—McDonald vs Tol Con St Ry Co. Reply. Hurd, Brumback & Thatcher, attys.

Docket—Equity Cases.

1173—Tillotson vs Warner et al. Journal entry 6-9-94—This day came the parties by their Solicitors and thereupon came John P. Carrothers and the Indus M. & Guar Co. and represented to the Court that this cause by agreement between parties represented by counsel settled and adjusted and moved the Court for an order confirming such settlement and thereupon came the defendant, The Thompson & Houston Elec. Co. by its attorney and denied that as to it this cause was settled by any such agreement and moved the Court for the appointment of a receiver to take charge of and keep in custody the bonds of the Put-in-Bay Water Works & Light & Railway Co., pending the further order of the court. And it appearing that in pursuance of a supposed settlement, the said bonds of the said defendant the Put-in-Bay W W L & R Co., 87 in number, heretofore in the custody of E. W. Tolerton have been distributed to counsel for various parties in interest in this cause; And it further appearing from statements made in open court, by the respective parties in possession of said bonds that L. G. Richardson has four, Geo. H. Ketcham, eleven, J. B. Foraker, 67 and Clarence Brown, five of said bonds it is ordered by the court that said parties do each retain in their possession the said bonds subject to and until the further order of this court.

758—Philip Knickle vs L E & W R R Co., jury waived; submitted to court, judgment for plff \$100. J. E. filed.

1173—J. K. Tillotson vs H. H. Warner et al, motion for appointment of recr to take charge of bonds Put-in-Bay W W L & R Co. Champion & Muir solrs for Thomas Houston Co.

1163—Frank B. Craig vs L E & W R R Co., verdict for plff, damages \$15000.

1163—Same vs Same, motion for new

trial. W. B. Ritchie, J. M. Lemmon, W. E. Hackerlorn, J. B. Cockrum, attys.

1182—The Farmer's Loan & Trust Company of New York vs The Toledo Ann Arbor & Northern Michigan Railroad Company et al. This day came the Intervening Petitioner Robert C. Hobson by Harvey Scribner his attorney and on his motion it is ordered that the matters in issue on the said intervening petition of said Robert C. Hobson be and the same hereby are referred to Mr. Irwin Belford who on account of his experience in such matters is appointed a special master commissioner for that purpose with all the powers usually exercised by Masters in Chancery. It is ordered that said special master proceed without delay to hear the said matters, report his finding of fact and conclusions of law relative to said matters and also the evidence submitted upon such hearing.

1028—The village of Celina vs East Port Sav Bk. Bill to open up a jdgt. Dismissed. To be reported.

1111 and 1112—Bidwell et al vs Tol Con St Ry Co. Motions for leave to file supplemental petition making new parties. Motions overruled. To be reported.

L. W. Van Pelt vs A. F. Stowe, admr etc. Deposition of Susan Sigler and Almira Van Pelt.

Docket—Law Cases.

1209—John Vought vs Penn Co. Dismissed without prejudice.

1222—McDonald vs Gilliland. Motion to require plff to make petition more definite and certain, granted. Plff to amend instant and deft has leave to answer in 15 days.

1051—H. H. Brundage et al vs Dardoff, et al.

1 AFT, Circuit Judge.

The first exception to the answer is overruled because it is based upon the insufficiency of the language complained of. I think the language complained of is impertinent and irrelevant and might have been stricken out on that ground but the exception is for insufficiency and therefore will be overruled.

The second exception is also overruled, because it seems to me that the answer is sufficiently responsive to the averment of the bill with reference to the giving of notice of the fixing of the time and place for the election.

The third exception of the answer is sustained, Complainant is entitled to have an explicit admission or a denial upon the point whether the notice for the election which was given gave those who voted to understand that the result of their vote would be the adoption of the constitutional amendments proposed with-

out further action by the general conference or not.

The fourth exception is sustained for the same reason.

The fifth exception is overruled.

It is not material how the report of the commission was prepared and how the signatures of the majority of that commission were obtained.

The 6th exception is overruled. It seems to me that the averment of the answer is quite responsive.

The exceptions for impertinence are overruled. The theory upon which the exceptions for impertinence were founded seems to be that the answer in equity should not contain evidence; but there is no such rule of pleading in equity. An entry will be drawn in accordance with this memorandum, overruling all the exceptions except the 3rd and 4th and giving the defendant 20 days in which to file an amendment to their answer to comply with the ruling of the Court. June 1., 1894.

1223—McDonnell vs Con St Ry Co., et al, demurrer of the City of Toledo. C. F. Watts, City Solr.

1142—W. I. Greene vs Toledo. Defendant by order of Council offers to confess judgment for \$211.50 and costs. Accepted and judgment according. See J. E.

Verdicts.

1158—Toledo vs Burwell, et al.

Verdict No 1. Compensation to be paid by City of Toledo to B. E. Bullock and P. S. Newton, owners of lot 19 and 40 and Water blocks 36 and 37 the sum of \$20000 for lands taken. The jury also allowed \$400 for a leasehold interest.

Separate Verdict.

Compensation to be paid by City of Toledo for that part e $\frac{1}{2}$ s e $\frac{1}{4}$ sec 30 t 9 s r 8 e lying between westerly line of the plat of N Tol and e line of Stickney's addn and between Summit st. and Maimee River; also blocks 21 and 22 plat N Tol; also Water block 42 subject to right of way T A A & N M, appropriated for public park, assessed at \$33271.51.

U. S. District Court.

June Term—Judge Ricks Presiding.

The Grand Jury reported June 8. The following indictments were returned against parties now in custody or apprehended.

891—Margaret McMurphy, perjury.

892—Isaac Ridenour, perjury.

893—James Cooley, falsely pretending to be U S employe to defraud.

894—Winfield S. Winters and James

Cooley, conspiring to commit an offense against the U S.

895—Chas N. Seward, taking letter from Post Office to abstract correspondence for another.

896—Chas N. Seward, wrongfully withholding pension money etc.

897—Chas N. Seward, same charge.

898.—Same, same charge.

899—Winfield S. Winters and James Cooley, procuring the making of false affidavit.

900 Chas Gulliver alias Chas Lookpaugh, unlawfully making, passing and having in possession counterfeit minor coin.

901—Matilda Munchausen, passing and having in possession counterfeit coin.

902—Albert Munchausen, same charge.

903—Willis Maxfield, same charge.

904—Wm Shultz, making and having in possession counterfeit coin and for having in possession mold for counterfeiting.

905—Rasty Levan, aiding in counterfeiting minor coin of the U S.

906—David Coakley, taking personal goods from barge Brooklyn with intent to steal and purloin the same.

907—John Sheridan, same charge.

908—Margaret Murphy, presenting and causing to be presented to an officer of the U S a false and fraudulent claim against the government of the U S.

In Admiralty.

169—Jos M Eley et al vs The Sir Shrewsbury et al, motion to set aside certain defaults. Swayne, Swayne & Hayes, Proctors.

175—John Dunsuth et al vs Barge Brooklyn, towage \$30. F. W. Rickenbaugh, Proctor.

TAXES.

Action in Equity to Enjoin the Collection of Taxes on Property Claimed to have been Illegally Withheld from Taxation—Decision of Judge Ricks, of the U. S. Circuit Court.

CIRCUIT COURT OF THE UNITED STATES.

Northern District of Ohio. Eastern Division.

In Equity, No. 5173.

Harry E Meyers, et al., executor of the Estate of John L. Wood, vs. Joseph C. Shields, Treasurer of Cuyahoga County, Ohio.

Squire, Sanders & Dempsey, of Cleveland, for complainants.

W. L. Avery, of Cincinnati, and T. K. Dissette, Assistant Prosecutor, of Cleveland, for defendant.

Briefs of Boynton & Horr, and Hoyt, Dustin & Kelley, and of John H. Doyle, of Toledo, for Plaintiff, in cause now

pending, involving same question, examined by Court.

STATEMENT OF THE CASE.

This is a Bill in Equity filed by the complainants, who are non-residents of Ohio, to enjoin the defendant, who is the Treasurer of Cuyahoga County, Ohio, from attempting to enforce the collection of \$183,658.50, which sum it is averred stands illegally assessed against said complainants on account of taxes alleged to have unlawfully and fraudulently withheld from the tax duplicate of said County by the deceased for the years 1887, 1888, 1889, 1890, 1891 and 1892.

The allegations of the bill are that the complainants are the duly appointed Executors of John L. Woods, who died on March 27th, 1893, as a resident and taxpayer of Cuyahoga County, leaving a will appointing complainants as his executors, both of whom are non-residents of Ohio and citizens of New York and Michigan, and that the controversy involves and presents to the Court a question arising under the Constitution of the United States.

The bill further avers that for each of the years 1887, 1888, 1889, 1890, 1891 and 1892, their testator John L. Woods, then being a resident of the City of Cleveland, did, as complainants believe and aver the fact to be, duly list for taxation all property owned by him and subject to taxation in the State of Ohio, and duly paid all taxes legally assessed against him, and in no one of said years did the said John L. Woods make a false return of his personal property for taxation, or conceal the same, or in any manner evade the payment of lawful taxes upon his property.

It is further alleged that after said Woods died, the Auditor of Cuyahoga County, wrongfully claiming that for the years above enumerated the deceased had made false returns of his personal property for taxation, and claiming to act under authority of Sections 2781 and 2782 of the Revised Statutes of Ohio, placed upon the tax duplicate and certified for collection against said John L. Woods, to the defendant, Joseph C. Shields, Treasurer, taxes and penalties as follows:

For the year 1887,.....	\$600,000.00
For the year 1888,.....	750,000.00
For the year 1889,.....	750,000.00
For the year 1890,.....	800,000.00
For the year 1891,.....	680,000.00
For the year 1892,.....	750,000.00

and increased said sums, respectively, by the infliction of a penalty of fifty per cent. thereof, and multiplied the sums thus increased by said penalty by the rate of taxation for each year, making the amounts charged against said John L.

Woods for taxes and penalties for said years as follows:

	Principal,	Tax.
1887, ...	\$ 900,000.00,	\$25,470.00
1888, ...	1,125,000.00,	31,837.50
1889, ...	1,125,000.00,	31,837.50
1890, ...	1,200,000.00,	35,160.00
1891, ...	1,020,000.00,	28,866.00
1892, ...	1,125,000.00,	30,937.50

The bill further avers that said taxes and penalties now stand charged for collection, and upon the face of the duplicate appear as a debt against the estate of said Woods in the hands of complainants as Executors, to be collected by action or distraint, and that defendant has begun an action against complainants in the Court of Common Pleas for said County, but no service of process has yet been made upon them.

The bill further avers that said Auditor failed to give the notice provided for by Section 2781-2782 of the Ohio laws, which notice the taxpayer is entitled to have to the end that he may show under oath, or otherwise that he did not evade the payment of the taxes which the Auditor proposes to charge against him, and the bill particularly avers that said Auditor, in charging said illegal taxes against the said Woods, did so without any notice whatever to him in his life time, or to the complainants, saving a notice served upon the latter, in substance saying that the agents employed by the authority of the Statutes of Ohio to look up property omitted from taxation have discovered errors in the tax returns of John L. Woods, and notifying complainants, as his executors, to appear and show cause why they should not be corrected and the omission placed on the Treasurer's duplicate for collection, which notice did not inform the complainants what kind of error had been made, nor for what year, nor that he claimed return false and fraudulent, so as to subject the said Woods to the penalty for such false return, and though the law authorizes the said Auditor to add only such specific property to the duplicate as he ascertains to have been falsely withheld from taxation, and at the true value in money of each item of property which he so adds, complainants aver that they examined said Auditor's records, and that it does not appear therein what property claimed to have belonged to said Woods was added to his return, or at what value the items make up said tax were assessed, and complainants allege that said Auditor did not find any specific property of said Woods omitted from his tax returns, but that without such finding, and irrespective of its true value in money, said Auditor arbitrarily, and without any authority of law, charged said

taxes and penalty against said Woods, and complainants therefore cannot ascertain what property it is for which they are asked to pay said taxes and penalties, and upon what basis of valuation they were placed upon the duplicate.

Complainant's further charge that the proceedings of said Auditor under Sections 2781 and 2782 of the Ohio Statutes, authorizing him in the manner hereinbefore charged to add to the tax return of the said John L. Woods, the proprietor as aforesaid, are void, because it is an attempt to take the property of said Woods without due process of law, because, under Section 1071, of the Revised Statutes of Ohio, the Auditor is entitled to a commission of four per cent. on all taxes added by him to the duplicate, under Section 2781 and 2782, thereby giving him a direct pecuniary interest in the result of his determination of the question submitted to his judgment under said sections; thereby in effect, holding out to him a direct bribe to decide such controversy against the citizen and in favor of the State, whereby said laws, in so far as they attempt to confer power upon said Auditor to add to the tax returns of the citizens and inflict penalties therein specified, are in conflict with Article V. of the First Amendment to the Constitution of the United States, and with the Fourteenth Amendment of the Constitution of the United States, and with the Constitution of Ohio.

The Complainants further charge that said taxes were illegally charged against said Woods, and do not in fact constitute a legal claim against his estate, because said finding and judgment were made after his death, and that said taxes are charged upon the duplicate of said County not against the estate of said Woods, but against him, whereby said Auditor has attempted to enter a finding and judgment against said Woods after his death.

To this bill the defendant has interposed his demurrer, on the ground that said bill does not state a cause, nor contain any matter of equity entitling the complainants to any relief against the defendant.

RICKS, J.

The first contention necessary to consider is the objection by the defendant, that this Court, sitting as a Court of Equity, cannot acquire jurisdiction of this case because the plaintiffs have a complete and adequate remedy at law. Counsel have insisted upon this objection very strenuously, and urged that the remedy in equity, afforded by the laws of the State of Ohio, cannot be applied in this Court, but that the limitation put upon the equitable jurisdiction of the Federal

Courts, by Section 723 of the Revised Statutes of the United States, must be an inhibition, at least to limiting this jurisdiction to administering in equity remedies under State statutes.

But the decision of the Supreme Court of the United States, in the case of *Cummings vs National Bank*, 101 U. S., 153, is conclusive on this subject. The Court had presented in that case the precise objection now urged, and in disposing of it with reference to the statutes of Ohio, said:

"But the statute of the State expressly declares that suits may be brought to enjoin the illegal levy of taxes and assessments, or the collection of them, and though we have repeatedly decided in this Court that the statute of a State cannot control the mode of procedure in equity cases in Federal Court, nor deprive them of their separate equity jurisdiction, we have also held that where the statute of a State created a new right, or provided a new remedy, the Federal Courts will enforce that right, either on the common law or equity side of its docket, as the nature of its new right or remedy requires. There can be no doubt that the remedy by injunction against an illegal tax, expressly granted by the statute, is to be enforced, and can only be appropriately enforced on the equity side of the Court."

The statute also answers another objection made to the relief sought in this suit, namely, that equity will not enjoin the collection of a tax, except under some of the well known heads of equity jurisdiction, among which is not a mere over-valuation, or the illegality of the tax, or in any case where there is an adequate remedy at law. The statute of Ohio expressly provides for an injunction against the collection of a tax illegally assessed, as well as for an action to recover back such tax when paid, showing clearly an intention to authorize both remedies in such cases."

In such case of *Shelton vs Platt*, 139 U. S., 597, the Supreme Court held that the Circuit Court of the United States, sitting in Tennessee, could not entertain jurisdiction of such a suit in equity; because the laws of Tennessee especially provided a complete remedy at law to the tax-payer resisting the collection of an alleged illegal tax. That statute provides that where an officer charged by law with the collection of revenue due the State takes any steps for the collection of the same, a party conceiving the tax to be unjust or illegal may pay it under protest and sue the officer to recover the money, and if the Court determines that it was wrongfully collected, then, upon its certificate to that effect the comptroller "shall issue his warrant for the same, which shall be paid in preference to other claims on the treasury." And the act further provides that there shall be no other remedy in any case for the collection of revenue, and no writ for the prevention of such collection, or to hinder or delay it, shall in any wise issue, either injunction, supersedeas, prohibition, or any other writ or process whatever. With such a complete and exclusive remedy at law prescribed by the State statute, a Federal

Court of Equity in Tennessee would not afford equitable relief by injunction. It would be difficult to frame a bill which would confer jurisdiction in equity, in view of that statute, and of Section 723, R. S. U. S. But the legislative authority in Ohio has adopted an exactly contrary policy. Section 5847, R. S. O., expressly provides the remedy by injunction to protect the tax-payer against the payment of an illegal tax. The remedy prescribed is equitable in its nature. A Federal Equity Court, sitting in Ohio, would therefore afford the equitable relief by injunction, when the same Court, sitting in Tennessee, would refuse it and remand the plaintiff to his remedy at law. Federal Courts decline, except in extreme cases, to interfere with the enforcement of the revenue laws of a State, because it embarrasses the operations of the local government, and deals directly with the most delicate and important powers of the State's sovereignty. It is only where a clear case for the interposition of the equity powers of the Court is presented, that it will exercise them. In Ohio, the laws invite and prescribe such relief by injunction for non-residents as well as for residents. In Tennessee, the law distinctly excludes that remedy. The cases of *Cummings vs National Bank* and of *Shelton vs Platt*, are therefore easily reconciled and applied. The former interprets the Ohio statute as conferring a new equitable right and remedy which the Federal Courts will enforce. For these reasons, it seems to me clear that this Court has jurisdiction in this case to afford plaintiffs such relief in equity as they may be entitled to invoke under the averments of their bill. But there is still another principle upon which the Court could acquire jurisdiction. The bill avers that the taxes assessed against the plaintiffs by the laws of Ohio become a lien upon their testator's property, and throw a cloud upon their title to the real property belonging to the estate. In the case of *Sanford, et al., vs Gregg*, 58 Fed. Rep. 620, which was a suit brought to enjoin a State officer from assessing or enforcing a tax for which it was claimed there was no warrant in law, the Court says:—

"While the Federal Courts are extremely cautious about interfering with the collection of current State revenues, yet they will not decline to enjoin a settlement of illegal back taxes which threaten to create a cloud on the real estate. * * * A settlement of alleged illegal back taxes which, when the proper steps are taken, will constitute a lien on the real estate, constitutes such a threat to create a cloud on the title as will authorize the interference of equity; and an allegation by taxing officers that they do not intend to take the steps necessary to create the lien does not oust the jurisdiction."

The case is elaborately argued by dis-

tinguished counsel, and, in a very brief opinion delivered by Judge Dallas, is disposed of, so far as pertinent to this discussion, by the statement that the bill

"is not aimed at the collection of current revenue, but of back taxes covering a period of twenty years; and this settlement, if not itself a presently existing cloud upon title to real estate, is certainly a potential threat to create one, which is not effectually withdrawn by the allegation that this defendant does not propose to pursue it. In *Jackson vs Cator*, 5 Ves. 688, the Lord Chancellor, (Loughborough,) said: 'I never ask more upon an application for an injunction than that a surveyor has been sent to mark out trees. I do not wait until they are cut down.' * * * The first step towards the creation of a lien having been taken the jurisdiction in equity then attached, and cannot now be divested by the averment of the defendant that he does not intend to proceed further in that direction.' * * * Therefore, and irrespective of the other grounds which have been urged with much force, I am of opinion that this suit is within the equitable jurisdiction of this Court."

The next question to be determined is whether the proceedings by which the Auditor assesses the tax and certifies the amended duplicate to the Treasurer and thereby makes it a lien upon the tax-payers' property, is "due process of law," within the meaning of the 14th Amendment to the Constitution of the United States.

And in the consideration of this question, it becomes important to ascertain whether, under the Ohio statutes and the mode in which they are enforced by the Auditor and Treasurer, the tax-payer has such notice of the proceedings as is necessary to make it due process of law.

And, first, what is "due process of law?" In *Murray's Lessees vs Hoboken Co.*, 18 Howard, 272, Mr. Justice Curtis says: "The words 'due process of law' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*. Lord Coke, in his commentary on these words, (2 Inst. 50,) says they mean due process of law. The constitutions which had been adopted by the several states before the formation of the Federal Constitution, following the language of the great charter more closely, generally contained the words 'but by the judgment of his peers or the law of the land.'"

The ordinance of Congress of July 13th, 1787, for the government of the territory of the United States northwest of the River Ohio, used the same words. The Constitution contains no description of these processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. "The article is a restraint on the legislative as well as on the executive and judicial powers of the gov-

ernment; and cannot be so construed as to leave Congress free to make any process due process of law' by its mere will."

In *Ziegler vs S. & M. Ala. R. Co.*, 58 Ala. 599, the Supreme Court says:

"Due process of law implies the right of a person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property in the most comprehensive sense, to be heard by testimony or otherwise, and to have the right of controverting by proof every material fact which bears on the question of right involved in the matter."

Daniel Webster, in his argument in the Dartmouth College case, said the "law of the land" was substantially equivalent to "due process of law," and defined the former as follows: "By the 'law of the land' is meant the general law, which hears before it condemns, which proceeds upon inquiry and renders judgment only on trial."

Adopting Mr. Webster's definition, the Supreme Court of Missouri, in *Clark vs Mitchell*, 64 Missouri 578, say:

"It is entirely correct in assuming that a legislative enactment is not necessarily the law of the land. The words 'by the law of the land,' as used in the Constitution, do not mean a statute passed for the purpose of working a wrong; that construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense."

Mr. Justice Miller, in *Davidson vs New Orleans*, 96 U. S. 104, in considering the meaning of these words, says:

"It is probably better to leave the meaning to be evolved by the general process of judicial inclusion and exclusion, as the cases presented for decision shall require; with the reasoning upon which such decisions may be founded."

In the same case Mr. Justice Bradley adds these words:

"In judging what is due process of law, respect must be had to the cause and object of the taking—whether under the taking power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'"

One principal runs through all these definitions. Webster expresses it tersely when he says: "By the law of the land is meant the general law, which hears before it condemns, which proceeds upon inquiry, and renders judgment only on trial." The party to be affected by the process which deprives him of his life, liberty or property, must have notice of the time and place of hearing, in some form and at some time, and must have the privilege of being heard. He must have his day in Court. Do the laws of Ohio governing the proceedings under consideration provide for such notice?

It is evident that the Auditor's proceedings complained of in this bill were instituted and carried forward by him under the assumption that Sections 2781 and

2782 of the Revised Statutes of Ohio, afforded him authority for the findings and the entry made on the tax duplicate. But a careful examination as to the origin, changes and final enactment of these two sections as part of the Revised Statutes of the State, clearly show that each has a separate history, that each was framed by the legislature for a different purpose, and each covers and applies to different violations of the tax laws. In the case of *Ruterman vs Ingalls*, 49 O. S. 486, the Supreme Court of Ohio clearly defines the distinction between the two sections.

Section 2781 was originally passed as Section 1 of the Act of March, 1861, O. L., Vol 58, p. 47. It was an amendment of Section 6 of the Act of April 5th, 1859. As then enacted, it provided as follows:

"Section 1. Be it enacted by the General Assembly of Ohio, that if any person, whose duty it shall be to make a return or list of property for taxation under the provisions of the Act for the assessment and taxation of all property in this State and for levying taxes thereon according to its true value in money, passed April 5th, 1859, shall make a false return, or shall evade making a return, it shall be the duty of the County Auditor to ascertain the true amount of the taxable property, moneys, credits and effects that such person ought to have returned or listed, in the manner prescribed in the 34th section of said Act, and to add thereto fifty per centum on the amount so ascertained; and the amount so ascertained, with the said fifty per centum, shall be entered on the duplicate for taxation."

When this Act was revised and became part of the Revised Statutes, that provision was repealed and omitted which required the Auditor to ascertain the true amount of property, moneys, etc., that such person ought to have returned or listed, "in the manner prescribed in the 34th section of said Act." The 34th section of that Act provided that in all such proceedings the Auditor might issue compulsory process for the attendance of witnesses, and then specifically provided that "it shall be the duty of the Auditor in all such cases to notify every such person before making the entry on the duplicate, that he may have an opportunity of showing that his statement * * * was correct." By this repeal of this clause of the original statute, section 2781 became a part of the Revised Statutes of the State without any provision requiring a notice from the Auditor to the tax payer of the nature of the proceedings before the former under that Section, and of the character or scope of the "entry on the tax duplicate," in which those proceedings might result. In 1886 this section was amended so as to add a penalty of fifty per centum to the amount of taxes found to have been falsely withheld in the tax-payer's return for each of the five years next preceeding, and multiply the sum or sums thus increased by the said penalty, by the rate of taxation belong-

ing to said year or years, and accordingly enter the same on the tax lists in his office, giving a certificate therefor to the County Treasurer, who shall collect the same as other taxes. The statute thus made in re sweeping in its provisions was still silent as to any notice to the tax-payer of the proceedings that might be going on against him in the Auditor's office.

Section 2782 is a re-enactment of Section 34 of the Act of April 5, 1859, without any material change.

It is evident from this brief history of the two sections that it was originally the legislative policy of the State to provide for a notice to the tax payer of the nature of the proceedings in the Auditor's office under both of these sections. But the bill in this case sets forth the notice given. That notice covered only the proceedings provided for by Section 2782. It certainly cannot be seriously contended that under a notice from the Auditor of an intention to ascertain whether the tax-payer has given to the Assessor "a false statement of the personal property, etc." for the current year, that such officer could proceed without other or further notice to find under Section 2781 that such tax-payer had made a false return for five years, and also "ascertain as near as practicable the true amount of personal property, etc. that such person ought to have returned or listed; and to the amount so ascertained for each year add fifty per centum, and enter the same in the tax lists in his office, giving a certificate therefor to the County Treasurer, who shall collect the same as other taxes."

In *Scott vs. the City of Toledo* 36 Fed. Rep. 385, Judge Jackson held "that the notice required by Section 2304 Revised Statutes of Ohio of the adoption of the preliminary resolutions declaring the necessity of opening a street and appropriating lands, having no reference to any assessment to defray the expenses thereof, is not sufficient to make a subsequent assessment without further notice valid."

But it is said the Supreme Court of the United States, in the case of *Sturgis vs. Carter*, 114, U. S. 511, held a notice given under 2782 was sufficient to support a finding under 2781. But an examination of that case shows that the Auditor served a written notice on Sturgis to appear in instant and give information of all property within his knowledge which had not been duly returned for taxation. He appeared and submitted to examination, and while in attendance was informed by the Auditor that he had not reported for taxation certain judgments and mortgages, called his attention to the statute

under which he was proceeding, and requested such explanation as he might choose to offer; and the Auditor then further informed him that he would file a supplemental assessment against him of the property which he had not included in his return for the preceding four years. He then made such supplemental assessment, taxing the defendant upon \$100,000 of stock of the Western Union Telegraph Company for the years 1874-75-76 and 1877, and entered the same upon a supplemental tax duplicate, and certified the same to the Treasurer for collection. The Treasurer brought a civil action on this assessment for \$10,776.83, in the Common Pleas court of Richland county, and it was removed to this court. Judgment was entered here against the plaintiff.

The Supreme court decided that inasmuch as Sturgis appeared, testified, and was then notified by the Auditor of what he proposed to report and find for taxes due the preceding years, that Sturgis had his day in Court, and was notified within the meaning of the Ohio Laws.

The errors to be corrected and the remedy to be applied under Section 2782, relate only to the current year. This is accomplished by the Auditor filing in his office a statement of the facts or evidence upon which he made such correction." But under Section 2781, the proceedings may result in adding to the tax duplicate, and making it a lien upon the tax-payer's property, the tax on the true amount of property such person should have returned for the preceding five years, with the penalty of fifty per cent.

The notice provided by Section 2782, could not, therefore, be held to relate to or cover the proceedings under 2781. This latter section provides a notice. We have seen that, as originally enacted, it did provide for notice the same as 2782; but in the revision of the laws that notice was omitted.

The proceedings then, under 2781, by which the plaintiffs were charged with this sum of \$184,108.50, were carried forward without notice to them. The evidence which the Auditor heard was given *ex parte*. The bill avers that he made no findings of fact, but arbitrarily entered a gross sum on the tax lists of his office, giving a certificate therefor to the County Treasurer, to be collected as other taxes.

But it is contended that it is not necessary to give the tax-payer notice of the proceedings in the Auditor's office, or of the finding made and certificate returned to the Treasurer by the Auditor, because such proceedings are merely preliminary, and the collection of the tax so imposed

cannot be enforced except by suit in Court, and of such suit the tax-payer has notice, and all rights to contest the legality of the tax assessed are open to him as a defense in such suit. If this contention be true, the tax-payer would not be deprived of his property without due process of law, for the opportunity to contest the tax and defend against its legality in the suit brought to enforce payment, (with no other remedies to be applied,) would give him his "day in Court." *Hagar vs Reclamation District*, 111 U. S. 701. It therefore becomes important to determine whether the contention of defendant's counsel be true.

In the case of *Scott vs The City of Toledo*, (before cited,) Judge Jackson found that the assessment made upon Scott by the City Council for the opening and improvement of the street on which his property abutted was made without legal notice to him, and was therefore "wanting in 'due process of law' if its collection could be enforced otherwise than by suit or legal proceedings in which all defenses to its validity or amount could be raised." He then proceeded to examine the Ohio laws under which such an assessment could be enforced, and found that they were collected the same as State and County taxes, and under 2995 of the Revised Statutes they could be collected either by suit, by forfeiture and sale of land, or by distraint of sufficient goods and chattels, belonging to the person charged with such taxes or assessments; and though he found that two other modes for collection by suit were provided, in either of which the tax-payer would have notice, yet because the corporation might select the method of collecting by distraint of goods and chattels, by which the tax-payer would be deprived of any opportunity to be heard in regard to the assessment, either as to its validity or amount, the requirement of "due process of law" would be violated. The learned Judge then concluded as follows:

"The Common Council of Toledo, having made the assessment in question without notice to, or an opportunity for hearing by complainants, and having the right to enforce its collection by distraining and selling their property without resorting to any suit which would give them an opportunity to interpose any defense, either to the validity or amount of said assessment, its action in the premises, even if authorized by the Statutes of Ohio, is wanting in that 'due process of law' required by the Federal Constitution before depriving the citizen of his property."

The principle so announced is fully supported by the decision of the Supreme Court in the case of *Hagar vs Reclamation District*, before cited. It is not in conflict with *Kentucky Railroad Tax Cases*, 115 U. S. 321. In that case, under

a Kentucky statute, taxes were assessed against certain railroads by a State board, after notice and hearing to the railroads. They complained that the Board did not give them a hearing as the law contemplated, and that the tax was illegally imposed, and deprived them of their property without due process of law. The Supreme Court held:

"The valuation of railroad property under the Act, and the assessment of taxes thereon, are not final, in the sense that they constitute a charge on the property subject to the tax, or a liability fixed upon the corporation owning it. That result can be attained, and the tax actually collected on by suit, * * * either for penalties incurred, * * * or for the recovery of the taxes themselves."

Scott vs Toledo is not in conflict with *Davidson vs New Orleans*, heretofore cited. In 1871, the petition of the City of New Orleans, and the Administrators thereof, was filed in the Seventh District Court for the Parish of Orleans, setting forth an assessment on certain real estate, made under the Statutes of Louisiana; for draining the swamp lands within the Parishes of Carroll and Orleans; and asking that the assessment should be homologated by the judgment of the Court. The estate of John Davidson objected. The objection was sustained by the District Court. The Supreme Court reversed that action, and approved the assessment roll and that it should operate as a judgment against the property described. A writ of error was sued out to the Supreme Court of the United States. That Court held:

"That whenever, by the laws of a state, * * * a tax assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. * * * This proposition covers the present case. Before the assessment could be collected or become effectual, the statute required that the table of assessments should be filed in the proper District Court of the state; that personal service of notice, with reasonable time to object, * * * This was complied with, and the plaintiff had a fair hearing in the court of first instance. If this be not due process of law, then the words can have no definite meaning, as used in the Constitution."

In both these cases, it must be observed, the tax imposed did not become a lien, or was not enforceable by distraint against the tax-payer until suit was brought on the assessment and a judgment of the Court entered thereon. No such protection is afforded by the Ohio statute.

It is doubtful whether in a suit to enforce collection of the assessment in Ohio

the defendant would not be bound by the facts found by the Auditor. The certificate sent to the Treasurer is made *prima facie* correct.

But the proceedings before the Auditor complained of in this case are even more obnoxious than the proceedings against Scott reviewed by Judge Jackson in the case cited. It is not a satisfactory or sufficient answer to the objections urged against the arbitrary action of the Auditor to say that his proceedings are only preliminary, and that in a suit brought to enforce the collection of such taxes, the tax-payer has his notice and his opportunity for presenting his defense.

The proceeding is not of this innocent character. The statute vests in the Auditor the power to proceed in a quasi judicial character. He summons the parties accused and witnesses, he administers oaths, hears the testimony and then proceeds to a finding which has far more vitality and efficiency than the judgment of a Court, because more summary remedies are provided for enforcing the collection of the assessment which he makes. Without stating the facts upon which his conclusion is based, or the reasons which lead him thereto, he adds to the tax duplicate an assessment, according to the averments of the bill in this case, of \$184.108.50. He certifies this supplemental duplicate to the Treasurer, and it thereby becomes a lien upon the tax-payer's property, and a blot upon his character and reputation as a truthful law-abiding citizen. Upon this certificate, the Treasurer may collect this assessment by distraint, and by those summary and arbitrary proceedings which have been properly upheld as agencies and means necessary to enforce the collection of taxes legally and justly imposed. This assessment and certificate, the result of the proceedings before the Auditor, are therefore made more harmful to the defendant than the judgment of a Court. Where the duplicate is regular upon its face, and the law is valid under which the taxes are assessed, the duplicate affords the Treasurer the same protection as an execution does the Sheriff against any liability for such seizure, even if the tax is improperly charged upon property not liable, or against a person having no property legally subject to taxation. *Loomis vs Spencer*, 1 U. S. 153; *Stone vs Viele*, 38 O. S. 317.

Under Section 1095, the Treasurer may distraint sufficient goods and chattels belonging to the tax-payer charged with such taxes, and shall immediately proceed to advertise the same, and sell the goods so distrained at public vendue, to pay said taxes and costs of such distraint

and sale. Under this section, the Supreme Court of Ohio, in *Stone vs Viele*, has held that the Treasurer may collect assessments by distraint, or sell lands upon which assessments have been levied, the duplicate having the force of an execution.

If the Treasurer fails to distraint goods, he may, under Section 1097, apply to the Clerk of the Court of Common Pleas in his County * * * and said Clerk shall cause notice to be given to the taxpayer requiring him forthwith to show cause why he should not pay such taxes; and if he fail to show a sufficient cause, the Court at the term to which said notice is returnable, shall enter a rule against him for the payment of such taxes and the costs of such proceeding, which rule shall have the same force and effect as a judgment at law, and be enforced by attachment, or execution, or such process as the Court directs.

Under Section 1102, the treasurer may reach by distress, garnishee or attachment, any "dues" or credits of the delinquent tax-payer, if he has not sufficient property subject to distraint, or he may serve upon any person indebted to such tax-payer a written notice, stating the amount of delinquent tax and penalty due; then such debtor may, after the service of such notice, pay such tax and penalty to the Treasurer, whose receipt for the same shall be a full discharge of so much of said indebtedness as is equal to such tax and penalty.

Under Section 2859, in addition to all other remedies already noted, the Treasurer may sue for these taxes, and in such suit he need only allege that the taxes are charged on the duplicate, and that duplicate is *prima facie* evidence of the amount and validity of the tax thereon charged.

We have thus, as the result of the Auditor's proceedings under Section 2781, an assessment entered on the tax duplicate for taxes for five preceding years, with fifty per cent. penalty, which is a lien upon the tax-payer's real property, for the payment of which the Treasurer may summarily distraint and sell at once, in any one of the several methods noted, his personal effects. It stands as a charge upon his property, a cloud upon the title to his real estate, a blot upon his character as a citizen, and yet it is claimed it is "due process of law," because if it is sought to enforce collection of such taxes by a suit in Court, the tax-payer will have notice of such proceedings, and may then defend against the *prima facie* case of guilt and indebtedness arbitrarily found against him. All the other summary remedies for collection provided

by law are open to the Treasurer, and may at any time be enforced; and unless the tax payer assumes the burden of removing the clouds upon his title and the lien upon his property by affirmative action, they stand as a menace to his credit and right of possession of his property, and as "due process of law" because of his right to notice and defense, provided the Treasurer chooses to resort to the remedy of a suit in Court.

This is not the right to appear and make defense at the time when it is most valuable and efficient. It is a right to defend after judgment and conviction. Judge Blatchford, in 7 Benedict, page 1, in commenting upon laws which gave a defendant the right of a trial to a Jury in the Appellate Court said: "In my judgment, the accused is entitled not to be first convicted by a Court and then to be acquitted by a Jury, but to be convicted or acquitted in the first instance by a Jury."

By the same principle, I conclude that it is not "due process of law" to enter on the tax duplicate without notice or trial what amounts in legal effect to a judgment against the tax-payer, enforceable by distraint and sale of his goods and chattels, and afterwards make it "due process" because it may become possible for the tax-payer to interpose a defense, provided the collecting officer elects to bring a suit to enforce the collection when the more summary remedies have proven unavailing.

This same principle is admirably stated by Mr. Justice Field, in the Railroad Tax Cases, 13 Fed. Rep. 752, when he says:

"But whatever the character of the proceedings, whether judicial or administrative, summary or protracted, and whether it takes property directly, or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, and the proceeding will want the essential ingredient of due process of law. Nothing is more clearly established by a weight of authority absolutely overwhelming than that notice and opportunity to be heard are indispensable to the validity of the proceeding. It has sometimes been intimated that a citizen is not deprived of his property, within the meaning of this constitutional provision, by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment entered against him. A judgment does not take property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may generally be enforced, not only against the real estate upon which it is a lien, but, as in this case, against the personal property of the owner also; and by it he may just as much be deprived of his property, and in the same sense, as the judgment debtor is deprived of his by the judgment."

For those reasons, I conclude that the Auditor's proceedings under Section 2781 of the Ohio laws, by which an assessment is entered on the general tax duplicate against the tax-payer, without notice of

opportunity to be heard, and which assessment is a cloud upon the title to his realty, and a lien upon his property enforceable by distraint and sale of goods and chattels without suit in Court, is not "due process of law" under the 14th Amendment of the Constitution of the United States.

The next important question to be determined is whether the Auditor is disqualified to make a valid assessment at the conclusion of the proceedings before him because of his direct pecuniary interest in the result. If he makes a finding against the tax-payer, and enters an assessment upon the tax duplicate, the statute gives him four per cent. upon the amount so received. If he fails to discover any property omitted from the tax-payer's return, he receives no compensation for his services. Because of his direct reward if he finds against the tax-payer, and of no reward if in his favor, is he disqualified, and are the proceedings therefore invalid?

The object of all legislation pertaining to judicial or quasi judicial proceedings is to furnish an impartial and wholly disinterested tribunal, before which proceedings are instituted and carried forward. It is to carry out the constitutional guarantee that no man shall be deprived of life, liberty or property without due process of law that the chief safeguard of a disinterested Judge, Jury, Referee or Arbitrator is so carefully provided by legislation and protected by judicial scrutiny. The most notorious criminal enjoys these safeguards to the extent that the magistrate who presides at his preliminary hearing must be disinterested; every Grand Juror who sits in the grand inquest as to his crimes must be disinterested; every Petit Juror who tries the facts after the Grand Jury presents its indictment must be disinterested; the Judge who presides at the trial, each and all must be wholly impartial and disinterested in the result. Even after conviction, if it is made to appear that by some mistake an interested or disqualified Juror has participated in the trial and verdict reached, such interest and bias on the Juror's part contaminates the whole proceeding, poisons the fountains of justice at their course, and makes the verdict null and void. Even in a civil suit, our system of judicial proceedings assures to each party a fair and disinterested Judge and Jury to pass upon the law and facts in controversy between them. Is it to be accepted that all these safeguards are to be disregarded, and all the precedents of long years set aside to support proceedings of the character we have considered, simply because the legislature has deemed it necessary to do so in aid of the tax assessing and collect-

ing powers of the State? It must be remembered in this connection that this inhibition of the Federal Constitution that the life, liberty and property of the citizen shall not be taken without due process of law reaches the legislative as well as the executive and judicial departments. We have already seen from well considered decisions of our highest Court that the legislative authority cannot usurp the power to determine what is due process of law, and on the plea of the public necessity ignore the well established safeguards which the law of the land has heretofore recognized and enforced. (61 Mo. 578). The taxing power is rightfully made efficient and protected with great jealousy, for it is necessary to the very life and maintenance of the sovereign, and very summary and sweeping enactments in support of this power have been held valid. But in the eager and hot pursuit of the citizen who wrongfully evades his just taxes, we must be careful not to graft upon the body of our judicial system proceedings so arbitrary and summary that they may hereafter be the basis and precedent for laws dangerous in the highest degree to the personal liberty and property rights of every citizen. A statute which confers upon an officer chosen solely with reference to other duties, the power to conduct a quasi judicial proceeding, which, in every stage of its progress is summary, and in its findings arbitrary in the highest degree, and which makes this officer, combining the functions of Judge and Jury, partial and biased, because directly interested by reason of the very liberal reward which flows to him if he decides against the tax-payer, is a gigantic and perilous stride towards withdrawing from the citizen every principle of constitutional protection heretofore deemed secure and perpetual. It is not a sufficient answer to all this to say that the Courts have upheld laws which are administered by officers and Judges who are interested in the fees which flow from proceedings instituted and conducted before them. In reply to this serious and grave objection to such an interested officer deciding a case of judicial nature, the Supreme Court of Ohio has said that a Justice of the Peace and a Probate Judge are likewise interested, because the security of their fees as taxed by law may depend upon the result of the suit which they are to decide. The comparison, while in some respects apt, loses all force when we come to consider it in detail. The Magistrate or Probate Judge has the same fees taxed for his compensation whether one party prevails or the other, or whether the judgment is for a small sum or a large sum. His fee is

secure if the parties are solvent, or he may protect himself by demanding security before the services are rendered. So that his compensation, which is usually but a small part of the judgment rendered, is assured if he is diligent, and its amount is not contingent upon the decision he makes. The case is therefore exceptional when the security of his compensation depends upon the party against whom his judgment is rendered. But, as we have seen, the Auditor's compensation is directly dependent upon the finding he makes. If he finds against the tax-payer, he is sure of his reward, and it is secured by the highest lien and most summary process for its collection. Not only is he interested in finding against the tax-payer, but his fee grows with the increasing amount of his assessment. The larger the assessment, the greater his commission. In the case now before me, if the Auditor's assessment stands, his fee will be \$7,360.00. The fee is evidently not intended to be given in the nature of compensation for services alone. It is therefore not only in the nature of a bribe to decide against the citizen, but a corrupting inducement to make his finding the largest possible. As the proceedings are arbitrary, and in the case under consideration no finding of facts was made, the temptation to a large assessment is so great that it would be wrong to submit the ordinary mortal to it. Not only is the Auditor thus given a tempting inducement to make a large and unjust assessment, but the statute offers still further inducements in the same direction by giving a large fee to the witnesses who furnish evidence against the evading tax-payer. Under the Act of April 10, 1888, the inquisitors employed to furnish evidence received twenty per cent of all that can be recovered; but this reward can only be paid out of the money actually collected. Thus we have a system, judicial in its character, which rewards not only the witnesses by a commission upon the amount of taxes recovered by reason of their testimony, but also provides a commission of four per cent. to the officer who conducts the proceedings and who awards the amount of the taxes to be assessed and collected. And so connected are these agencies that it has been held that mandamus proceedings can be maintained by the inquisitors to compel the Auditor to act under Sections 2781-2782. *State. ex. rel., vs Crites*, 18 O. S. 142.

But it is contended the Auditor is not *eo nomine* a Judge, and the proceedings are not judicial, and therefore the assessment made by him is not invalid because of his pecuniary interests in the judgment rendered. It is true he is not designated

as a Judge, but the Supreme Court of Ohio has repeatedly held that the proceedings conducted by him are judicial in their nature. *Gager vs Prout*, 48 O. S. 110, and *Stat., ex. rel., vs Crites*, 48 O. S. 460.

In the first case cited, the Supreme Court said:

"Conceding that the proceedings before the Auditor are judicial in character, it does not follow, as we think, that they are to be governed by all the precise rules of the Code of Civil Procedure for the commencement and prosecution of civil actions. Notice is required, but no particular style for the proceeding or form of notice is required."

In the case against Crites, on page 173, the Supreme Court said:

"No doubt the duty is one of delicacy, and calls for the exercise of a conservative judgment and sound discretion. The great power vested in County Auditors by the statute is liable to cause hardship and oppression if exercised recklessly and wantonly."

In the second case against Crites, on page 465, the same Court, in referring to the Auditor's proceedings, said:

"The respondent was acting in a quasi judicial capacity; he had assumed jurisdiction and entered upon the investigation; the law imposed upon him the duty of hearing and weighing evidence and rendering a decision upon it. This necessarily involved the exercise of judicial discretion."

An officer called upon to summon witnesses, hear testimony, and then "exercise a conservative judgment and discretion," and, as in this case, enter upon the tax duplicate an assessment for over \$184,000, which shall be a lien upon the tax-payer's real estate, and which may be summarily collected by distraint, it seems to me is exercising powers of a judicial nature, and of the most potential character. If the Auditor were merely finding a tax due, the amount of which is fixed by statute, as the Dow Law tax, of a license fee, involving no judicial function, the want of notice would not avail the tax-payer as a matter of defense, neither would the officer's interest in the fee disqualify him.

Having thus shown the judicial character of the duties which the Auditor performs in the proceedings which have just been reviewed, how does the law say his direct pecuniary interest in the judgment he renders affect the validity of his proceedings?

In *Pearson vs Atwood*, 13 Mass., 324, Justice Parker said:

"It is very certain that by the principles of natural justice and of the common-law no man can lawfully sit as a judge in a case in which he may have pecuniary interest. Any interest, however small, has been held to render a judge incompetent."

Lord Campbell said, in *Dimes vs Grand Junction Canal*, 3 H. L. C., 759:

"It is of the last importance that the maxim that no man is to be a Judge in his own case

should be held sacred, and that it is not to be confined to a cause in which he is a party, but applies to any cause in which he has an interest. We have again and again set aside proceedings because an individual who had an interest took part in the decision."

If one of the Judges of a Court is disqualified on this ground, the judgment will be void even though the proper number may have concurred without the disqualified Judge. *Queen vs Justices of Hartfordshire*, 7 Q. B. 753. *R. R. Co. vs. Howard*, 20 Mich. 18.

The legislative voice has spoken in equally positive inhibitions against interested persons acting as Judges, Appraisers, Road Viewers or Commissioners. In Ohio, statutory provisions are in force allowing a change of venue of the suit upon the mere affidavit of the parties of prejudice, bias or interest.

Section 550 makes any Judge interested or biased incompetent to sit in the case, and the *ex parte* affidavit of a party makes a change of Judges obligatory without controversy.

In 4 O. S. 675, it was held that where two of the Judges were stockholders in a railroad company, and that fact appears on the record, and the bondholder does not waive the objection, the order of the Court appointing appraisers in appropriation proceedings will be reversed.

In 105 Mass. 225, the Supreme Court held that a County Commissioner is disqualified by personal interest to take part in adjudications of his board laying out and directing the construction of a highway over land of his sister's husband, and such proceeding cannot be rendered valid by acceptance, waiver, consent or release, but is wholly void.

Cooley, on Constitutional Limitations, 410-411, thus states the rule:

"No one ought to be a judge in his own cause. This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise. It is not left to the discretion of a Judge, or to his sense of decency, to decide whether he shall act or not. All his powers are subject to this absolute limitation, and when his own rights are in question he has no authority to determine the case."

It is no sufficient answer to these statutory and judicial expositions of the maxims of the law to say that in most of the cases cited the legislature has recognized the disqualification of the Judges, Appraisers and Commissioners, because of their interest, and provided they should not act when so interested, but in the case of the Auditors the legislature empowered them to act notwithstanding their interest, and this policy was necessary to make efficient the revenue laws of the State. But it is not within the power of the legislature to make any process which it may deem necessary or essential, even for the collection of pub-

lic-revenues, "due process of law," within the meaning of the Federal Constitution. 18 How: d 276.

The Supreme Court of Missouri, in the case before cited, says such a "construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense."

I am aware that the Courts have gone as far as the safeguards of the Constitution permit to uphold legislative enactments of an arbitrary character, for the collection of the public taxes. The many ways that have been devised to evade and defeat the collection of taxes has made it necessary to resort to extreme measures to enforce their collection. But in all the cases which I have found there is this principle recognized and respected, that where there is the exercise of any judicial function imposed upon any of the taxing corps of officials, those judicial functions must be exercised in accordance with those sound maxims of the common law and principles of natural justice which have always controlled judicial proceedings. And the test of whether the powers conferred are judicial or not would seem to be whether, with the exercise of the authority to hear testimony and determine the facts, was coupled the power to enter a finding which had the force and effect of the judgment of a Court. Thus in the case of *The United States vs. Ferreira*, 13 A. 40, it became necessary to determine whether the authority conferred upon the U. S. District Judge in Florida to adjudicate on claims for injuries suffered by inhabitants of that State by the operations of the American Army in Florida, which claims were to be paid if the Secretary of the Treasury should, on a report of the evidence, deem it equitable, was authority to exercise judicial power. The claims were to be adjudicated and paid if allowed in accordance with the treaty of 1819 with Spain. The first Act of Congress in 1813 provided Commissioners to hear and adjudicate the claims. The next Act authorized the United States District Judge to adjudicate the claims. He did so, and from his decision an appeal was taken to the Supreme Court. The Court held that as the Act did not provide that there should be a suit, with parties, and process to issue, the proceedings were *ex parte*. The Court then says:

"But neither the evidence or his award are to be filed in the Court in which he presides, nor recorded there; but he is required to transmit both the decision and evidence upon which he acted to the Secretary of the Treasury; and the claim is to be paid if the Secretary thinks it just and equitable, but not otherwise. It is to be a debt from the United States upon the decision of the Secretary, but not upon that of the Judge.

It is too evident for argument upon the subject, that such a tribunal is not a judicial one. * * * The decision is not the judgment of a Court of Justice."

Apply these tests to the Auditor's proceedings. He has the power to issue process; he has parties to the proceeding; he makes a finding and files his statement of the facts in his office, and then he makes his decision, which is an assessment framed into an amended duplicate, which is certified to the Treasurer; and it then becomes a lien upon the tax-payer's property having all the force and effect of a judgment at law, with all the summary remedies for enforcement hereinbefore set forth. Surely we have here judicial powers and proceedings, and to the person who conducts these proceedings, and has the authority to enter such a judgment, should certainly be applied the disqualification of a direct personal interest in the result, a test which we have seen is universally applied to Judges and all persons exercising judicial powers.

But it is said these laws are made in the interest of the public, are necessary to secure the collection of public revenues, and none are injuriously affected by their arbitrary character but those who are trying to evade the payment of their just taxes. Suppose we concede this to be true. It is still as much the duty of the Court to pass upon these questions as though the entire public were clamoring against their injustice. But the bill in this case avers that the testator made a full and true return of all his taxes for the years involved, and the demurrer admits this fact to be true. This case is therefore not one to which such suggestion applies. This Court reluctantly interferes with the enforcement of State revenue laws, even when they effect only back taxes, and I am in full sympathy with those who believe that every citizen should pay taxes justly and legally imposed. I would not interpose to aid those who are not willing to bear their just share of the public burdens, unless the taxes sought to be enforced have been imposed by proceedings not in harmony with those safeguards provided by the Constitution, to which I have before referred. Having, after very careful and painstaking investigation, reached the conclusion that these taxes have been illegally imposed, it is the duty of the Court to afford to all who are thereby wrongfully burdened, such relief as the law provides.

The Supreme Court of Ohio has decided these laws constitutional, and the proceedings of the Auditor thereunder valid. The question now under consideration in this Court is not whether these

laws are valid under the Constitution of Ohio. If it were, this Court would be bound by that decision of the highest tribunal of the State. But the question presented, being a Federal question, and involving a construction of the Constitution of the United States, the Federal Courts are charged with the duty and responsibility of deciding it, unaffected by the decisions of the State Courts, except so far as they may be persuasive.

For the reasons already stated, I am of the opinion that the proceedings provided by Section 2781 of the Revised Statutes of Ohio, when carried forward without due notice to the tax-payer, or when conducted by the Auditor, who is directly interested in the proceeds collected under the assessment made and imposed, result in depriving the citizen of his property without due process of law, are therefore invalid under the 14th Amendment to the Constitution of the United States.

I have in this opinion considered the questions involved upon the broad principles presented in construing the Ohio Statutes with reference to the inhibition of the foregoing amendment, unaffected by any special issues peculiar to the case now before me, because there are five other cases pending in this Court, brought here by removal from the State Courts. The questions considered and decided affect all these cases alike, and apply to all of them.

In the case now under consideration, exceptions were taken by counsel for the defendant, that the allegations of the bill were defective, in that it was not averred that plaintiffs, as executors, had any property, real or personal, within the restraining process of the County Treasurer, and that therefore no ground for equitable interference was shown. An amendment to the bill has been tendered since the argument and submission of the case, which meets these and other contentions. Counsel object to this amendment, because, if allowed, it cannot relate back and make valid the restraining order granted upon the original bill. But the amendment does not effect, or relate to, jurisdictional facts. The want of notice of the Auditor's proceedings, his interest in the controversy, and the illegality of the tax, as a result of such averments, are all set forth in the original bill, and are a sufficient basis for the temporary injunction allowed. The amendment tendered, of which defendant's counsel had notice, relates to facts so manifestly incontestable, that the plaintiffs ought to have the benefit of whatever effect they may have upon the

questions involved, and is therefore allowed.

The demurrer, both to the original and amended bill, is overruled.

Sixth Judicial Circuit.

EVIDENCE.

Refusal to Give or Refuse Requests to Charge Before Argument, is Error.

(Huron County Circuit Court, May, 1894. Present: Chas. C. S. Bentley, P. J.; C. H. Scribner and G. R. Haynes, J. N.)

Wm. S. Root, plaintiff in error,
vs The Incorporated Village of
Monroeville, O., defendant in error.

(In an action for personal injuries resulting from a defective sidewalk plaintiff sought to prove that the sidewalk on the side of the street opposite the place where the plaintiff was injured, was out of repair and in an unsafe condition, for the purpose of showing that a person passing along said street had no choice, for both sides were bad and unsafe. HELD, that such testimony would have been proper in rebuttal and after the defendant had offered testimony tending to show that the defect was noticeable and that a way existed there which the plaintiff could well have taken, but without such testimony on the part of the defendant, it tended to introduce immaterial issues and prejudice the defendant and was properly excluded by the lower court.

1. Evidence showing that the defendant, immediately after the accident, made a repair of the defective sidewalk is not competent testimony to show that the defendant knew, prior to the accident, that the defect existed. It does not follow that by repairing a walk confessedly under the charge of a village, there was an admission by them that it was out of repair at the time of the accident.

2. A conversation between plaintiff and one of the members of the Council of the village after the accident is not competent to bind the village by an admission of a past fact and evidence of the plaintiff's statements as to his suffering, of his being injured, coupled with other statements in the nature of a recitation as to how his injuries occurred is incompetent and was properly excluded.

3. The testimony of a witness that plaintiff "was a bricklayer and mason by profession, but after the accident, was unable to do anything on account of the injury to his left foot," does not come under the rules which admit the statement of a witness that he observed that another person was disabled or sick or suffering pain.

4. The statement of a witness which embodies hearsay evidence, although portions of his testimony might have been competent, if all offered together, should be excluded.

5. The refusal to charge the jury that the burden of proof is on the defendant to prove that the plaintiff contributed to his injury by his own negligence, is not error when the plaintiff, in the introduction of his own testimony, affords some presumption of such contributory negligence as would prevent his recovery.

6. A request to charge that "if you find for the plaintiff, in assessing his damages, you should award him full compensation for the injury received. In this you may consider the pain suffered, and which naturally and PROBABLY will be suffered and the effect it has had and PROBABLY will have," * * * contains an erroneous proposition. The mere probability of what

might happen in the future is not proper ground for the assessment of damages.

8 Under the late amendment to R. S. Sec. 5190, which provides that when the evidence is concluded, either party may present written instructions to the Court on matters of law and request the same to be given to the jury, which instructions shall be given or refused by the Court before the argument to the jury is commenced, it is the duty of the Court to give or refuse to give such instructions at that time and the refusal to do so is error sufficient to warrant reversing the judgment.—ED. LEGAL NEWS).

BENTLEY, J. (Orally.)

This is a proceeding in error to reverse the judgment of the court of common pleas, against Mr. Root rendered in an action commenced by him in that court against the Incorporated Village of Monroe-ville, Ohio, to recover damages for a certain alleged injury received by him while walking along one of the sidewalks in that village and which he claimed the Village should have kept in repair, but which they had negligently allowed to become and remain out of repair, whereby he he was injured.

As the terms of the petition may be important in considering some of the alleged errors, I will read a portion of it. After making some general allegations in regard to the duty resting upon the Village, the petition proceeds: "On the 15th day of October, 1889, said street and sidewalks were, by the negligence of said defendant, allowed to be, and remain out of repair; and the sidewalk along the north side thereof, in front of in-lots numbers 121 and 123, on the plat of said Village which walk was originally constructed of stone, was broken with many dangerous holes and sharp and jagged projections. By the negligence of the defendant, on the evening of that day, said holes were allowed to remain open, and broken pieces of stone were not removed, but were exposed to contact without lights or guards. The defendant had, by its proper officers and agents, full knowledge and notice of the dangerous condition of said walk in time to remedy it and to prevent all injury therefrom and it

then and there became the duty of said defendant to so remedy it as to prevent such resulting injury. On said evening of the 15th, day of Oct., 1889, this plaintiff was lawfully passing along said street upon said sidewalk wholly unaware of its dangerous condition, and accidentally, without any fault or negligence on his part, while walking there, was precipitated into one of said holes in said sidewalk, his foot striking on one of said sharp, rough and jagged pieces of stone and his said foot and person were thereby cut, torn and severely bruised and wounded, whereby he was greatly and permanently injured."

He further makes some allegations regarding the accident, the permanency of his injury, and that he was put to great expense in endeavoring to be cured of it.

The Village, in its answer, admits its character, as charged, and admits its control over this particular street in question, and its general duty to keep the sidewalks in repair on this street, but denied in general all the other averments of the petition and also alleges that if the plaintiff received any injury, it was on account of his own negligence contributing thereto. The reply of the plaintiff denies this affirmative allegation of contributory negligence.

The case came on for trial and was tried to a jury. The plaintiff gave evidence, as recited by the bill of exceptions, tending to prove all of the material averments of his petition. The defendant produced its testimony, and at the close of the evidence and before the argument began, the plaintiff preferred to the court certain written charges requesting that they be given to the jury as the law of the case. This was refused, and after the argument to the jury had closed, the court gave to the jury its general charge, and the jury, after retirement, brought in a verdict in favor of the Village

against the plaintiff. A motion for a new trial was made and overruled and judgment was rendered upon the verdict, and a bill of exceptions was allowed and filed in the case. The bill of exceptions does not purport to exhibit all of the testimony that was given in the case. It states the giving of certain testimony tending to prove certain facts. It states certain questions which were asked of the witnesses and the ruling of the court upon them. It recites and gives in *hac verba*, certain requests of the plaintiff and the charge of the court, and contains the recitation that it embodies all of the charge given by the court; but the recitation and the other matters were simply to exhibit what is claimed to be errors of the court in its rulings upon the trial of the case.

In the bill, after reciting the giving of evidence by the plaintiff to sustain the material allegations of his petition, that is, the facts which the plaintiff's evidence tended to prove, are stated affirmatively here in the bill, this occurs: "Among the witnesses called by the plaintiff, were Peter Seymour and Jacob Hammel, who were asked by plaintiff's counsel as to the condition of the sidewalks on both sides of Monroe Street at the time when said accident occurred. To this question, defendant's counsel objected and plaintiff's counsel stated that he proposed to show by the witnesses that the sidewalk on the opposite side,—on the side of the street opposite the place where Plaintiff was injured, was also then out of repair and in an unsafe condition generally, and that there could be no choice for a person passing along said street between the sidewalks on the two sides of it, for both were bad and unsafe; but the court sustained the objection and excluded said evidence and the same was not given to or considered by the jury, to

which ruling the plaintiff by his counsel then and there excepted."

That is one of the errors which is urged here as a ground for setting aside the verdict and reversing the judgment.

The issues, as they were presented by the pleadings are to be considered here. The plaintiff alleged that this dangerous defect existed in a certain sidewalk of the public street along which he had occasion to pass and did pass. The Village, not denying that this was one of the streets of which it had charge, or that this was a sidewalk which it was bound to keep in repair, admits both of those facts. Presumably then, the plaintiff below, without some averment or showing otherwise, had a right to pass along that public sidewalk. This evidence was offered by him in chief and he claims that it was proper because it would negative the idea that he ought to have avoided this dangerous condition which he claimed to be in the sidewalk, by showing that he substantially had no choice in the matter, or, at least, that he had no opportunity of avoiding that by going on the other side of the street.

Had this testimony been offered in rebuttal, and after the defendant, Village, had offered testimony tending to show that this defect was noticeable, and that another way existed there which the plaintiff could well have taken, then this testimony would have been proper; but to have anticipated the evidence which might have been given on the part of the defense without anything, up to this time, suggesting, as appears in the record, any necessity for such testimony, would, we think, have been subject to the objection, mentioned by the counsel for the Village, that it would tend to introduce immaterial issues and possibly prejudice the Village by showing that not only had it suffered this particular defect to exist, but

that it was also negligent regarding other sidewalks and streets.

Upon this view of the matter, the action of the court in excluding it was correct. It does not appear that it was afterwards offered in rebuttal.

The next objection appears as stated in the bill, in this way: "Among Plaintiff's witnesses was Frank Egle, who was asked by Plaintiff's counsel as to the repair of the sidewalk at the place where Plaintiff was injured, by the authorities of said Village, soon after the accident. To which question defendant's counsel objected, and the Court said that if the repairing was done after the injury, it was not competent in any way, and though plaintiff's counsel offered to show that fact by the witness, the court sustained defendant's objection, and the same was excluded from the jury, to which ruling of the court, the plaintiff by his counsel then and there excepted."

As against the claim of the plaintiff, that this exhibits error, counsel for the Village says that the bill does not exhibit the particular question asked, and that therefore, this court cannot determine but that the ruling upon the particular question may have been correct. But without regarding now that argument of the counsel for the Village, we think the ruling of the court was correct any how. That is, in order to show, under the allegations and issues here, that this defect existed or that the Village knew that it existed, it was not competent to show that shortly after that the Village made a repair of the particular defect.

A case was cited in one of the Circuit Court Reports,—the circuit court of Ashtabula County, I think. The plaintiff in that case was precipitated down an embankment along a certain street, and the fence which the Village theretofore erect-

ed, had become out of repair at that point, so that there was no barrier to keep parties from being precipitated down the bank, and the court in that case held that the fact that the Village shortly after this accident repaired that fence was competent. But it appears very clear from the report and the circumstances, that that ruling is not applicable here. In that case, the principal issue was as to whether or not this place was of such a nature and in such a condition, that the defendant in that case was charged with any duty to provide a barrier there, and the Circuit Court held that, from the fact that they had built the fence, and even after this, repaired the fence at that particular point, it involved an admission upon the part of the defendant that it was bound to keep up some barrier there; that it recognized it as a dangerous place, and as against accident there it ought to provide.

It would have been a parallel case if, in this action here at bar, the Village had in its answer denied that it had any duty to perform respecting the sidewalk in question; and the fact were shown that shortly after this accident it had made repairs upon this very walk. That would have implied an admission that it was a walk as to which it owed some duty; but it would not follow that by repairing a walk confessedly under the charge of the Village, there was an admission by them that it was out of repair at the time of the accident. So there was no error in that respect.

Next, without taking the time to read the exact wording of the bill,—evidence offered by plaintiff was rejected tending to show a conversation between plaintiff and one of the members of the council of the Village after this accident occurred. He was not competent to bind the Village by an admission of a past fact. That would warrant its ex-

clusion so far as it simply tended to show that, and the other fact that is involved in the conversation, that is, the statement by the plaintiff of his suffering,—of his being injured at that time, is coupled with other statements which would not be competent, being a recitation as to how he was injured, or how his injury occurred, & etc., and as the whole matter was offered together though possibly a small portion of it is competent for a particular purpose; but the main portion of it being incompetent, it was properly, when thus offered, excluded entirely.

The same may be said of the ruling of the court in excluding certain evidence of Charles J. Hoyt who stated that the plaintiff "was a brick layer and mason by profession, but at that time,—that is, the time after the accident,—he was unable to do anything on account of the injury to his left foot, I believe."

We think this does not come under the rules which admit the statement of a witness that he observed that another person was disabled or sick or suffering pain, or something of that kind. It was a general statement which involved something more than the statement of a mere fact within the personal knowledge of the witness.

Objection was made to certain other testimony offered by the plaintiff in the deposition of Mr. Hoyt,—another conversation with the plaintiff after the injury. The answer and question which was excluded was this: "During April and May, 1891, he was a foreman for me in building a brick building for the electric light plant at Bellevue, Ohio, and during that time, saw him almost daily, and during that time his foot hurt him so that he could hardly attend to his work and on several occasions he asked permission to leave his work and go for treatment to a doctor and did go and see a doctor about it, and as he

said to me, he complained about it hurting a great deal and gave him a great deal of pain so much so that it interfered with his work. His foot troubled him all through the work and he was not able at any time to wear a shoe upon it during the time he was working for me."

It will be noticed that in that answer there is some hearsay. It was all offered together, although a portion of it may be competent, we think the plaintiff should only have offered such portion of it as could be deemed competent; but offering it altogether,—the whole answer, the general exclusion was correct. It is also noticed, regarding that answer that there is much in it that is not a very close statement of the facts within the observation of the witness, but facts that he would be as apt to gather generally, as from present indication of pain on the part of the plaintiff.

The witness states this also, which was excluded,—being a part of the Hoyt deposition:—"My first visit to him, (plaintiff), at Monroeville, Ohio, was to get him to superintend the construction of the brick electric light building at Bellevue, Ohio, and he then told me about his foot and showed it to me, and said that he hesitated to take my work on account of the condition of his foot. He stated to me, at that time, that he stepped or broke through the sidewalk and injured it."

Some remarks that I have already made will apply to that. It is a mere recitation of the plaintiff as to how his accident occurred and was not proper.

There was an objection to another portion of the deposition of the said Hoyt in which he said that, prior to this accident, "Have never known him to be sick, and having bodily strength to do his work; believed him to be in good health

during that time," that is, for a long period.

The exclusion of that comes pretty close to the line. While we think it would not be error to have admitted it, in view of the condition of the testimony generally, we would not be willing to say that the exclusion of that was of so prejudicial a character as would warrant the disturbance of the verdict or judgment in that respect.

Among the plaintiff's requests to charge is this one,—number 3; (These are requests which the plaintiff, at the close of the testimony and before argument, requested the court to give to the jury:)

"The burden of the proof is on the defendant to prove to you that the plaintiff contributed to his injury by his own negligence and plaintiff cannot be legally found to so have contributed unless he is shown to have been at fault in so doing."

If we had all the testimony before us, we could determine whether on the trial, the refusal of that was, or was not error. We must dispose of it in view of this rule, that there may be cases where the plaintiff, in the introduction of his own testimony may afford some presumption of such contributory negligence as would prevent his recovery. In such a case as that a charge of this kind would be erroneous; that is to say: in such particular case, the burden would be upon the plaintiff to introduce testimony to show that he was not guilty of contributory negligence because the jury might regard his own testimony as showing that he was so guilty, and the burden in such a case would be upon him to remove the suggestion or presumption which would arise against him from his own testimony, but as to the testimony here, we cannot say judicially that there may not have been testimony offered by him that would make this re-

quest inapplicable to the particular case, and therefore are not able to say that the refusal to give this charge was error.

10th request: "If you find for the plaintiff, in assessing his damages you should award him full compensation for the injury received. In this, you may consider the pain suffered, and which naturally and probably will be suffered, the extent of the injury itself, and the effect it has had and probably will have on his bodily comfort and his ability to labor; the permanent character of the injury, if it is permanent; the expenses, if any, which plaintiff has incurred in doctoring the injury, and any and all other facts bearing on the question, and from them all, what would be fair and reasonable compensation."

We are inclined to think that, under the investigation we have given to similar subjects heretofore, that there is involved in this request an erroneous proposition. Instead of damages for *probable* suffering, for the *probable* effect of the injury, in the future, plaintiff would not be entitled to damages, but rather for those effects that would, with reasonable certainty, follow. The mere probability which might happen in the future would not be proper ground for the assessment of damages, and thinking thus, we fail to find error in the refusal of the court to charge that proposition.

The charge of the court is excepted to for three particular reasons set out in the bill of exceptions. It will require too long a time to read them now and I will point out the particular reasons why we think it was not erroneous in the charge of the court, itself. We think there was no prejudicial error in the charge of the court itself. The main clause, which seems now to be the most important question, is as to the effect of the late

amendment to the statute 5190, providing for proceedings upon the trial of a case. The initial paragraph is as follows: "When the jury is sworn the trial shall proceed, except as provided in the next section, in the following order, unless the court for special reasons otherwise direct."

Then follows that the plaintiff,—without quoting the exact language,—the plaintiff may make a brief statement and the defendant a statement and the party who would be defeated if no evidence were offered on either side, must first produce his evidence; then the other party. And the parties will then be confined to rebutting evidence, and then comes the 5th subdivision of the section. As it stood originally before the act of 1882, 89th, Ohio Laws, pages 59 and 60, it provided, "when the evidence is concluded, either party may request instruction to the jury on matters of law, which shall be given or refused by the court." But under that section, certain courts held that it was a matter of discretion with the court whether or not it would charge the jury or give any instruction before the argument, and the said amendment of 1892 now provides in the 5th paragraph: "When evidence is concluded, either party may present written instructions to the court on matters of law, and request the same to be given to the jury, which instructions shall be given or refused by the court before the argument to the jury is commenced."

The next sub-division—6, provides for the submission of the case, or the making of the argument. After that, the 7th, begins the statement: "The court, after the argument is concluded, shall, before proceeding with other business, charge the jury; any charge shall be reduced to writing by the court, if either party, before the argument

to the jury is commenced, request it." There are other provisions in the 7th paragraph which I need not take time to read.

The question is, whether the legislature intended by the amendment to make it the duty of the court to give to the jury written requests applicable to the case and proper in form, after the conclusion of the testimony and before the beginning of the argument; whether or not it has provided a statutory right of a party to that action by the court.

It is contended that, notwithstanding that amendment, the first section provides that the court may otherwise direct, and that that leaves it still as a mere matter of discretion as under the former holdings of some of the courts.

On the other hand, it is contended that this amendment was evidently designed to effect this particular purpose, and possibly made in view of similar rulings that had been made under the old section as it stood. The first section, and the first part of the section, provides, as I have stated, that the trial shall proceed in the following order—"unless the court for special reasons otherwise direct."

This would evidently regard simply the mere order of proceeding, that in a certain case it might be proper for one party to begin his evidence instead of the other, and it may be that it would be proper to vary the mere order of some of those proceedings upon the trial; but it will be observed that in this section are various positive regulations which have always been regarded as binding upon the courts, and which they are bound to follow. This section provides something else besides the mere order of business, as for instance: The reducing of the charge to writing

or not modifying it or explaining it thereafter orally, etc.

As to the particular matter here, this strikes us as significant and important. At the close of the evidence, of course, there is a division of the case. It is an epoch, so to speak, in the case—in all cases. This statute then provides that at that stage of the proceedings a party is entitled to have pertinent and proper propositions which he may present, given to the jury, and before he shall be called upon to submit his argument to the jury.

We can well see that that might, in certain cases, be exceedingly important. It might be a question what view the court might take of the law and its resolution would have a great effect upon the argument which the counsel might make to the jury. He might, upon a certain view of the law which the court would not take afterwards, waste his entire argument to the jury, and leave unguarded material facts which, if he had assumed the other view, he would have been glad to discuss.

So it would seem that there is an underlying reason which might have been present in the mind of the legislators when they framed the statute.

There is another consideration, and that is, it is provided that at this juncture of the trial, there may be a request to the court to charge upon certain propositions, then, after another well known part of the trial has taken place, namely, the argument, the statute directly provides the court shall then proceed, before going to other business, to charge the jury. By the provisions of this law, the charge may, at the instance of the party, be divided into two sections and between the giving of these two sections, the statute specifically provides

that the counsel may be allowed to argue the case to the jury.

We think, as the law now stands, that it was evidently the intention of the legislature to give the party that right, and that refusing it is error, unless, as in all cases, there should be an application of the general provision of the code that no error which is not in effect apparently prejudicial to the party, shall work a reversal of the judgment.

It is argued that there may have been special reasons in this case why the court should otherwise direct, than to follow this particular order, and in connection with that it is said that he did, in fact, give the material part of these propositions to the jury in his general charge, and that this court must presume, in favor of sustaining this judgment, that there was, in fact, special reasons for the action of the the court. But the section is that it shall proceed as follows, "unless the court shall otherwise direct."

There is nothing upon this record showing that the court directed the order of proceedings in any way to interfere with the statutory order, except the mere bald statement that he refused to give these charges, and we think this is not sufficient to warrant the presumption that he did give the direction interfering with this plain, statutory order, but the inference is that he refused it upon the idea that it was a mere matter of discretion on his part which he could freely exercise, or possibly, that from his view of the law, these propositions were erroneous.

The propositions other than the two already mentioned we think were all proper, and such as should have been given. They were carefully prepared, properly framed and properly presented, and there is no reason to think, no proper reason, why they should not have been given before the argument. To be

sure, there are certain of them that appear, perhaps, sufficiently, in the general charge of the court; but it would be a grave question whether, if they all did appear in the charge of the court, it would relieve the record of the error in not giving them at the time the statute gave the party the right to have them given. Beside, we think there are quite a number of these requests that were not even substantially, at least, not fairly and fully comprehended in the charge as given, and for the error in refusing to give these charges, except the two that I have named, when requested, the judgment will be reversed and the cause remanded to the Court of Common Pleas for a new trial, and the costs will be assessed against the defendant in error.

Stewart & Rowley and Horace Andrews, attys for plaintiff in error.

Hon. C. P. Wickham and L. W. Wickham, attys for defendant in error.

SUPREME COURT PROCEEDINGS.

General Docket.

Tuesday, June 12, 1894.

2371—John A. Topliff, et al., vs Isaac N. Topliff. Error to the Circuit court of Cuyahoga county. Judgment affirmed.

2399—Elizur G. Johnson et al, vs Jemima Cromwell et al. Error to the Circuit court of Seneca county. Judgment affirmed. Dickman, C. J. and Spear, J., dissent.

2421—Mary E. Simons vs The City of Toledo. Error to the Circuit court of Lucas county. Judgment affirmed.

2445—John Burgoyne, Jr. Adm'r. vs Robert Moore. Error to the Circuit court of Hamilton county. Judgment affirmed.

2446—Joseph A. Rhoner, Adm'r. etc. vs The N Y P & O R R Co. et al. Error to the Circuit court of Summit county. Judgment affirmed.

2521—Cynthia J. Gibson vs Abigail Bean, et al. Error to the Circuit court of Cuyahoga county. Judgment affirmed.

2562—William M. Fitch et al, vs C. E. Bolton. Error to the Circuit court of

Cuyahoga county. Judgment affirmed.

2827—A. S. Ludlow, assignee, vs David J. Jones. Error to the Circuit court of Hamilton county. Dismissed by consent of all parties, at cost of plaintiff.

2907—In re. application of Florence E. Virgien for a writ of Habeas Corpus. Error to the Circuit court of Hamilton county. Judgment affirmed.

2929—Ansel T. Walling vs Samuel B. Humble, Adm'r. Error to the Circuit court of Pickaway county. Reversed and judgment for plaintiff in error on the authority of No. 2646, *James M. Kerr et al. vs Charles E. Lydecker, Adm'r.*

2935—Kirk, Christy & Co. vs S. S. Chandler. Error to the Circuit court of Trumbull county. Judgment affirmed.

2936—William Koppes et al, partners vs Charles Cooper et al. Error to the Circuit court of Huron county. Judgment affirmed.

2944—Eliza C. Hunt et al vs Rachel Hunt et al. Error to the Circuit court of Belmont county. Judgment of the Circuit court reversed, and judgment for plaintiff in error. Grounds stated in Journal Entry.

2960—Lorinda Sutter vs Jabez Bainbridge et al. Error to the Circuit court of Lorain county. Judgment affirmed.

2949—C. A. Palmer vs A. B. Booco. Error to the Circuit court of Fayette county. Judgment affirmed.

The following cases on the General Docket have been dismissed for want of preparation.

2996—George Woodruff vs Ada Mel-sheimer. Error to the Circuit court of Van Wert county.

2999—Valentine Doller, assignee, vs Augustus Daussa. Error to the Circuit court of Ottawa county.

3002—John W. Russell vs Peter Lock. Error to the Circuit court of Franklin county.

3010—The State of Ohio, ex rel A. C. Buchanan vs The Mercer Gas & Fuel Co., et al. Error to the Circuit court of Miami county.

3017—Lewis F. Day vs Rinner & Lowe. Error to the Circuit court of Knox county.

3028—Edward Clark et al vs William H. McCurdy. Error to the Circuit court of Mercer county.

3038—Albert B. Wittler et al vs Lucy A. Lucas. Error to the Circuit court of Madison county.

3055—Fannie L. Valentine et al vs The Union Central Life Ins Co. Error to the Circuit court of Portage county.

Toledo Legal News.

OFFICIAL LAW JOURNAL OF LUCAS COUNTY, OHIO.

In the matter of the designation of a daily Law Journal in Lucas County. As required by Sec. 1 of an Act passed April 14th, 1884 and amended Feb'y 25, 1886, entitled "An Act relating to the posting of court calendars and legal notices in certain counties," as amended May 9, 1894, the Judges of the Courts of Record in said County other than the Circuit Court, hereby jointly designate the TOLEDO LEGAL NEWS, a daily law journal published in said County, as the journal wherein until the further order of said judges, shall be published all the notices, advertisements, abstracts and matters and things specified or referred to in said Section 1.

Approved { GILBERT HARMON,
REUBEN C. LEMMON,
ISAAC P. PUGSLEY,
Judges of Common Pleas.
I. I. MILLARD, Probate Judge.

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A. L. SLEEPER, Editor.
C. G. WILKINSON, Business Manager.

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SATURDAY, JUNE 23, 1894.

JUDICIAL CANDIDATES.

The two Republican judicial conventions, held in Toledo on the 16th and 18th inst., placed in nomination for both Circuit and Common Pleas benches, very worthy and able men.

Major E. B. King, of Sandusky, was chosen to succeed, if the people so elect, Hon. C. S. Bentley, now presiding Judge of the Sixth Judicial Circuit.

Judge Bentley received an expression of respect and esteem from the convention, in the following:

Resolved, That we, the Republicans of the Sixth Judicial Circuit, in convention assembled, tender to Judge C. S. Bentley our confidence and esteem for the wise, judicious, impartial and courteous manner in which he has discharged the duties devolving upon him as Circuit Judge of this district.

Hon. Chas. Pratt, chosen to succeed Hon. R. C. Lemmon, on the Lucas County Common Pleas Bench, has been a prominent lawyer at the Toledo bar for many years and has always been identified with the best interests of the profes-

sion. He will, if elected, make an able and an excellent Judge. Judge Lemmon's term will expire one year from next October.

JAMES H. SOUTHARD.

The Republican Congressional Convention made very short work of selecting a candidate for Congress. It was equally good, however, for Mr. James H. Southard, as a lawyer and a citizen, enjoys a high reputation. His standing at the bar is without the suspicion of a shadow and if it is the will of the people of this district that Mr. Southard should represent them in Congress he will undoubtedly do so with ability and fidelity.

Concerning attorney fees, in actions brought on invalid assessments, the Hamilton Co. Circuit Court, (opinion by Smith, J.) in a decision which appeared in the Court Index June 8th, says:

"A judgment was obtained against the city for a balance of \$34,778.96, which represented the amount which Chas. M. Steele failed to recover on a contract for construction of sewers on account of an invalid assessment. This judgment included \$2,500 costs and attorney's fees incurred by Steele. The reviewing court holds that it was error to include a charge for attorney's fees in the judgment, and unless there is a remittitur of so much of the judgment as was given for counsel fees alone, it should be reversed."

In a recent number of Advance Sheets of Opinions by the Supreme Court of the U. S., L. R. A., on file in this office, we observe, in a syllabus of the opinion of Justice Brewer in *Lewis vs Wilson, et al*, decided in February, 1894, the following:

1. There is nothing which prevents a party having a verdict from consenting to its reduction, and if he does so, though only for the sake of obtaining immediate satisfaction of his claim and to avoid further delay and further litigation, he may not, after the entry of judgment based thereon, the receipt of payment, and an acknowledgment of satisfaction, repudiate the whole transaction, and obtain a judgment for the full amount of the

verdict, on the ground that under the law the court had no power to disturb the verdict.

2. A party may in open court consent to a reduction of the verdict in his favor, and the noting of his consent by the clerk in the journal entry of the judgment is sufficient evidence thereof, and cannot be questioned.

One of the most sharply disputed questions concerning corporations has been the right of an insolvent corporation to make preferences among its creditors. A recent decision of the Supreme Court of Texas, *Lyons-Thomas Hardware Co. vs Perry Store Mfg. Co.*, 22 L. R. A. 802, denies *in toto* the validity of such preferences, while the decision in *Brown vs Grand Rapids Pailor Furniture Co.*, 22 L. R. A. 817, by the United States Circuit Court of Appeals sitting in Michigan, following the law of that state upholds such preferences, even when made in favor of the directors of the corporations themselves. In a note accompanying these cases, in which the multitude of decisions on the question are compared and analyzed, it is said that both these cases are in conflict with the weight of authority, which is found to be overwhelmingly in favor of the legality of preferences to ordinary creditors, except when restricted by statute, but overwhelmingly against the validity of such preferences when made in favor of directors.

LEGAL EFFECT OF INDORSEMENT FOR DEPOSIT AND CASH CREDIT.—There is no act more familiar in banking practice than that of a customer handing his pass-book over the counter, containing checks which he desires to deposit, bearing his indorsement as follows:

"For deposit to the credit of—"

for the amount of which a credit entry is at once made. And yet the question who owns such a deposit after it is made, is one so subtle and technical, that it puzzles the most learned minds and results in their reaching directly opposite conclusions. This is illustrated by the decision of the Court of Appeals of Maryland, published in the present journal, of

whose seven judges, four (a majority) decide that the bank takes absolute title to paper so indorsed at the time of deposit, while three hold that the bank is merely an agent to collect the paper and deposit the proceeds, when collected, to the credit of its depositor.

In other words, the theory upon which the majority proceed is that when paper is deposited in bank and a cash credit given therefor on the pass book of the depositor and on the books of the bank, there arises by virtue of the cash credit, immediately, an absolute and irrevocable right to draw on the deposit; while the opposite idea is that the cash credit is provisional until the collection of the paper is complete, the privilege of drawing in the meantime when accorded, being gratuitous and revocable at the pleasure of the bank. Both constructions of law, of course, relate to cases where there is no special contract or understanding between bank and depositor on the subject. The question of the legal effect of such a deposit as passing immediate title is of particular materiality in cases of failure of the bank of deposit, the point being then important in its effect on the right of conflicting claimants to the proceeds.

This being so, the wisdom of inserting the opinions of the court at such length in a book for the practical guidance of bankers may be questioned, for they may say, we do not conduct business on the anticipation of failure, and are not, therefore, interested in points only important on the happening of that contingency. But questions of this nature, arising out of bank insolvencies, are likely to recur, and not only this, the point decided is of considerable materiality in the case of going banks. If the bank takes title at time of deposit and the paper is dishonored, notice of dishonor must be given the depositor, as indorser. The knowledge is also material as affecting the depositor's right to check against the deposit, before collection.—*The Banking Law Journal.*

ANTICIPATORY BREACH.

Lord Justice Kay in *Synges vs Synges* (1894), 1 Q. B. 466, has added a stone to

the claim in honor of Lord Cockburn's "inchoate right" in a plaintiff to sue on a promise before the defendant's performance is due. The action was on an agreement of the defendant to leave at his death to the plaintiff a life interest in certain lands owned by him, in consideration of her promise to marry him. Having induced the object of his affection to unite her lot with his, this gentleman conveyed to his daughter the land in question, doubtless hoping to leave any difficulties to his executors. But the lady brought her action immediately, perhaps wisely distrusting the compensation she might get from her husband's property at his decease, and the court gave her the present value of the life interest.

The case shows the nature of the doctrine quite free from the consideration involved usually in the question whether the plaintiff is obliged to go on to perform in order to get his right of action. It is now evident that in England, by a contract, one binds one's self to quite a different thing from the mere performance,—that is, to a course of conduct from the time of promise till that of performance which shall make the promise reasonably probable of fulfilment. It is barely possible in the case in point that the defendant might have caused his daughters to reconvey to him, and so fulfilled his contract. In fact, in all the cases on this subject, the breach has ordinarily been no more than a strong probability that defendant could not perform. Had the question come up for the first time in a case like the present, it could hardly be possible that the additional liabilities to a contract, imposed by the doctrine, should not have been observed.—*Harvard Law Review*.

Common Pleas Court.

Court of Common Pleas of Lucas County, Ohio,
(April Term 1894.)

Patrick A. MacGahan, Guardian, vs
Sebastian Kleiner, Executor, et al.

H. by her will gave all her property after the payment of her debts and certain legacies to her eight children to be divided between them equally. By the last clause of the will she directed that her property shall not be divided until the youngest child becomes of age and that all expenses for the natural support or education of

the two youngest children shall be paid out of the proceeds of her estate as a whole. *ILLU.* That the rents and profits or income of her entire estate, until the youngest child becomes of age, may be used, so far as necessary, for the support or education of the two youngest children, but that no part of the principal can be used for such purposes.

PUGSLEY, J.

This action is brought by the plaintiff as guardian of Rosie Harbauer and Charles Harbauer, minors, to obtain the judgment of the court as to the proper construction of the last will and testament of Catharine Harbauer, deceased. The testatrix died on Dec. 2nd, 1890, leaving eight children two of whom are the said minors. Her will was executed on July 1st, 1890. By the first clause of the will she directed that her debts be paid out of her real estate. By the second clause she gave to her four youngest children \$50.00 each and all the household furniture in equal shares. By the third clause she gave all the rest and residue of her real estate and personal property of every description to her eight children (naming them) in equal shares. By the fourth clause she appointed Sebastian Kleiner, executor. The last clause is as follows: "My real estate and personal property, however, shall not be divided until the youngest child, Rosie Harbauer, shall have reached her 18th year and all expenses for the natural support or education of the youngest 2 children, Charlie and Rosie Harbauer, shall be paid out of the proceeds of my estate as a whole."

It is alleged in the petition that the income from said entire estate after paying the expenses of managing the estate is insufficient for the support and education of said

minors and that by the provisions of said will all the property of the testatrix should be sold and converted into money and the proceeds thereof applied, so far as is necessary, to pay all reasonable expenses in the support and education of said minors. The plaintiff asks for the direction and judgment of the court as to the true construction of the will and as to the rights of all parties in the estate of the decedent.

In the construction of a will the intention of the testator must govern, and the intention is to be gathered from the language used and all parts of the will are to be read and construed together in the light of the circumstances under which the will was executed. Upon a consideration of the whole will and the evidence submitted by the parties, I am of the opinion that it was not the intention of the testatrix that the property should be sold and the proceeds of such sale applied to the support of the minors, but that the words "the proceeds of my estate as a whole" mean the rents and profits or income of the entire estate, in other words, such proceeds as may be derived from the property consistently with the devise of the property to all the children. Such a construction gives effect to each and all of the provisions of the will and to the general intent of the whole will, and is supported by the following considerations:

1st. The word "proceeds" is a word of equivocal import. It does not necessarily mean what results from the sale of property. It may mean

the income of property or what results from the renting or investment of property. Its meaning in each case depends upon the connection in which it is employed and the subject matter to which it is applied. *Thompson's Appeal* 89 Pa S. 36, *Hunt vs Williams* 126 Ind 493. There is no direction in the will that the property shall be sold to furnish support for the minors. The support is charged not upon the property but upon the proceeds of the property and nothing is said about selling it in order to obtain "proceeds."

2d. The words, "my estate as a whole" mean "my estate all together" or "my estate not in parts or parcels but as a whole." If, therefore, the word "proceeds" means the proceeds of a sale, the estate as a whole must be sold, whether necessary or not for the support of the minors, because the expenses of support must be paid out of the proceeds of the estate as a whole. Such a construction ought not to be adopted, unless it is unavoidable. On the other hand the words "out of the proceeds of my estate as a whole" are consistent with the intent that the property shall be kept together and be made as productive as possible and that the expenses of support shall be paid out of the produce or income thereof.

3rd. In express terms there is a definite devise of all the property to the eight children to be divided equally between them when the youngest child becomes of age. Apparently from the language used the enjoyment of all the property

by all the children after the youngest child becomes of age, was as much in the mind of the testatrix as the support of the minors until the youngest child becomes of age. Both purposes are carried out by giving to the minors for their support the income of the entire property until the time for division shall arrive. The last clause of the will modifies the third clause only by postponing the division of the property until the youngest child becomes of age, and by providing what shall be done with the proceeds that accrue from the property in the mean time. In all other respects the 3rd clause is unaffected by the last clause.

4th. The circumstances surrounding the execution of the will support this view. All of the children were then supporting themselves or were able to support themselves, excepting the youngest child. In view of the circumstances in life of the testatrix and her family and of the character and condition of her property and of the manner in which the other children had been brought up, as shown by the evidence, there can be no reasonable doubt that she believed the income of her property to be ample for the support and education of the minors in the same manner and to the same extent that the other children had been supported and educated.

Counsel for plaintiff cited and relied upon the case of *Bierce vs Bierce*, 41 O. S., 241. In that case the testator directed that after the death of his wife all his property then remaining shall constitute a fund for the support and mainten-

ance of his daughter and her children during her life and at the death of his daughter, the same shall be equally divided between her children. It was held that the "fund" so constituted was charged with the support and maintenance of the daughter and her children as its primary object and that if the income proved insufficient, the principal could be resorted to for proper support. The court say, "The words 'shall constitute a fund' are full of meaning. The word 'fund' savors of personalty. It means something that can be invested and re-invested. The support was expressly charged upon this fund, without any word indicting that the charge was to be limited to the income of the fund." And in answer to the claim that the charge ought to be limited to the income of the fund, because the will directs that upon the daughter's death "the same shall be equally divided between her children," the court say: "A fund charged with the support of A for her life does not cease to be the fund, because some of its principal is necessarily consumed in supporting A. Hence, the words, 'the same' are not so definite as to require or even to justify a denial of needed support to the daughter and her children during her life." This case is distinguishable from the case at bar. There the support was charged upon the property.

"The property shall constitute a fund for the support of the daughter" is the language of the will. It amounted to a devise of the property to the daughter for her support during her life. Here the sup-

port is charged not upon the property or its equivalent the fund, but upon the proceeds of the property.

Again in the case cited the property was first to be applied to the support of the daughter during her life, and upon her death to be divided among the children. The support of the daughter was apparently the primary object of the testator. Here there was in the first instance a direct and definite devise of all the property to all the children. This was made subject by the later clause to the provision that it should not be divided until the youngest child becomes of age; and that the support of the minors should in the meantime be paid out of the proceeds of the property. It cannot be said here that the support of the minors was the primary object of the testatrix. The judgment of the court is that by the will only the income of the estate can be applied to the support and education of the minors.

E. O. King and P. A. MacGahan, for the plaintiff.

J. E. Pilliod and F. M. Dotson, for the defendants.

Sixth Judicial Circuit.

CONVERSION.

Negligent Possession by Officers Does not Release Owners Right of Action.

(Huron County Circuit, May Term 1894—Present; Hous, C. S. Bentley, P. J., C. H. Scribner and G. R. Haynes, J. J.)

Anson Sammis et al vs Robert Sly. Error to the Court of Common Pleas of Huron County.

(When the property of A is levied upon by an officer and held under process against B, A may have an election, either to resort to replevin or some other appropriate remedy by which he shall claim the property itself in disregard of the levy, or he may regard it as depriving him of his property and as the conversion of it by the officer, for which he may have his suit for dam-

ages. The mere fact that an officer, after A's right of action had legally risen, did not appoint a watchman over the property, and did not do such acts as would restrain other creditors of the judgment debtor from taking it, does not have the effect of releasing the right of action already accrued and the owner, his demand upon the officer for a surrender of the property having been refused, may have his suit for damages in case such property, in the negligent possession of the officer, is destroyed. The levy amounts to a conversion, if the owner elects to so regard it, and it makes no difference if the officer is afterwards somewhat lax in maintaining possession of the property.—Ed. Legal News.)

BENTLEY, J.

The case of Anson Sammis and others against Robert Sly is an action in error to reverse the judgment of the court of common pleas in favor of Mr. Sly and against the plaintiff, in error here, for damages claimed by Mr. Sly on account of the alleged conversion of a stack of rye belonging to him, by the plaintiff in error and others to their own use.

There are quite a number of specific errors which are alleged and pointed out in the record, but they all depend upon the view which this court may take of the main issue,—the principal controversy between the parties, and when we have briefly stated our views in that regard, we will have disposed of the various errors without particular mention of them.

The facts presented are substantially these: On the 8th, of September, 1891, Mr. Sammis began a suit before the justice of the peace, against one Goodrich on a promissory note that he claimed to have against Mr. Goodrich, and an attachment was then procured in the usual manner, to be issued by the justice in the action, for \$300, the plaintiff's claim, and \$10 probable costs of the action. The writ of attachment is in the usual form, directing the officer to whom it should be delivered to attach the property of the defendant in this action, Mr. Goodrich,

This attachment was delivered on the 18th, of September, the day of its issue, to one of the plaintiffs in error, Mr. Towne, the constable. He took the writ on that day, about 4 o'clock in the afternoon, and levied it upon various articles of property, as the property of Mr. Goodrich, and among the articles that he levied upon was this stack of rye in question. Mr. Sammis was present on the occasion, and what the constable did was subsequ-

ently returned by him on the writ to the justice's court. I will read his return of the writ: "Received this writ Sept. 18, 1891, and by virtue of its order, I went to the place where the defendant's property was found, and there, at the hour of 4 o'clock P. M. of the same day, in the presence and hearing of J. O. Burr and Edward Seeley, did attach four stacks of hay and one stack of rye and about 8 acres of beans as the property of Edwin Goodrich, and did then and there attach them, and caused the same to be appraised by the said J. O. Burr and Edward Seeley, (see schedule att.) and I served this writ on the within named Edwin Goodrich by delivering to him a true and certified copy of this writ with the endorsements thereon. I also served the within named S. J. Hawkins by delivering to him a true and certified copy of this writ with endorsements thereon. I also served this writ on the within named William Dart by leaving a true and certified copy of this writ at his usual place of residence," [Hawkins and Dart being garnishees in attachment]. Signed "S. P. Towne, Constable," and attached were the exhibits mentioned in the return, showing the levy.

The constable having returned this writ into the justice's court, that proceeding remained pending there for some time.

In the meantime, Mr. Sly claiming to be the owner of this stack of rye, went to Mr. Towne and informed him of that fact and wanted him to give it up, and he refused. Some days afterwards, but without any act upon the part of Mr. Towne, other than leaving the stack of rye as he found it, the stack was destroyed by fire. Thereupon, Mr. Sly began this action against Mr. Sammis, the plaintiff in attachment, and Towne, the constable, for the value of the stack of rye, claiming that it had been seized and converted to their own use. He obtained a judgment for \$120. In the action, the court charged the jury that there was no question presented to them for disposition except as to whether or not the plaintiff was the owner of the rye, and when it was seized, and what its value was at that time.

It is claimed that the various rulings made by the court upon the trial were er-

roneous because, under the circumstances, the defendants were not liable.

The evidence tended further to show some of the specific acts done by the officer and the plaintiff in the attachment suit when the levy was made. The facts seem to bear out the return of the writ which I have read. That is, whatever act was done, was done in the presence of these two witnesses who were made appraisers and appraised the property. The stack was standing at the time upon land then in the possession of Mr. Goodrich, on his farm. It was property that he had raised, but which sometime before, it was claimed, and perhaps not seriously disputed, had been sold to Mr. Sly. The officer went to the stack of rye in company with the plaintiff in attachment, Mr. Sammis, and laid his hand upon the stack and pulled a few straws out of it and declared that he levied upon it as the property of Mr. Goodrich,—he levied the writ that he had then in his hand. This was in the presence of Mr. Sammis, as I have mentioned, and then further proceedings were had as to the appraisal, and the officer went away and left it, it being quite a bulky stack of rye. He did not seek after that, to remove it. He did not interfere with it manually at all, after that time. He took no measures to release it and the writ remained on file at the justice's office. Upon application by Mr. Sly for its release, it was refused, as I have before stated. The stack of rye thus stood there with no watcher or custodian appointed by the constable until it was consumed by fire.

Now, the plaintiff claims that gives him a right of action, and constitutes the conversion of this stack of rye, and both the officer and Mr. Sammis claim that it does not.

The main question upon which the great share of the argument was expended was the question of the regularity and sufficiency of this levy, it being claimed that it was no valid levy unless the constable there took the property manually into his possession, or at least, appointed a watchman over it, or somebody to take care of it and keep it in custody for him,—unless a re-delivery bond was given.

Quite a number of authorities have been cited in support, as it is claimed, of this contention, but the authorities cited are mainly and almost altogether in cases where there was a contention between the different creditors of the same debtor; cases where the property was said to be levied upon, and other persons were claiming some lien or interest through the debtor at a date subsequent to the levy, or claiming benefit of attachments as creditors of the owner of the property.

I shall not take time to point out specifically the authorities, but a number of authorities were cited in this state to the effect that when the property of A was levied upon by the officer and held under process against B, as the property of B, A, may have an election either to resort to replevin or some other appropriate action by which he shall claim the property itself in disregard of the levy; or, on the other hand, to regard it as depriving him of his property, and as the conversion of it by the officer for which he may have his suit for damages.

It seems to us that this record indicates what would have been, but for the protection of this writ, a trespass upon the part of the officer, in going to this place and interfering with the possession of the property—with the claim at the time that he took possession of it—and with the power to enforce the claim—with power to actually take that property into his possession. He regarded himself as in possession of it. He supposed that he had levied upon it. He supposed that he had acquired dominion over it and claiming that he had—still claiming continued dominion, he refused to deliver it when demanded—when he was apprised of the claimed ownership of Mr. Sly. In every thing else but the subsequent holding—the continued actual holding of possession, this levy would seem to be regular and sufficient.

But now, if the acts of the officer at the particular time, amounted to a levy, or amounted, in other words, to an assertion of dominion over the property, when it was in his power, and he actually placed his hand upon it in token of his subjecting it to his authority and possession, then at that time, there arose a cause of action for conversion in favor of the true owner of the property, other than the attachment debtor, which he might have begun; and, while it may be that the owner may afterwards have been deprived of the benefit of such action on account of some act of his own, such as his assuming possession, or his exercising his option otherwise, yet technically at least, a cause of action arose in his favor.

The mere fact that the officer, after such an action had legally risen did not take the property, did not appoint a watchman over it, and did not do such acts as would restrain other creditors of the judgment debtor from taking it, if it had been the property of the debtor, yet we think those acts of omission would not have the effect of releasing the right of action which had already accrued, and the Court of Common Pleas evidently took this view of it; and it also took upon itself to construe the meaning

of this return of the writ itself, and we think that the Court of Common Pleas was justified in holding that the acts done by the officer amounted to a seizure and conversion of the property, if the plaintiff in this case elected to so treat it.

There would be then, left in the case, even under these circumstances, the question whether or not Mr. Sly had elected to treat it as a conversion, or had elected to disregard the levy and to proceed (seeing that there was no actual necessity of the employment of actual force, or breach of the peace apparently) to re-possess himself of it.

That was a question of fact which would arise in the case, and should have been submitted to the jury, and perhaps was. Of course, it stands out as a feature in the case, quite prominently, that this action was not begun until all chance of Mr. Sly's getting this property back had been barred by the fire, and there was testimony to the effect that even after this refusal to give up the property, he had engaged a man to go and thresh it, and that the man thus engaged was only prevented from doing so by the actual destruction of the grain. There was testimony in conflict with this testimony. That was a matter for the jury to determine and which perhaps they did determine, that is, if, as a matter of law, those facts would constitute an election any way. It would not be profitable, perhaps, to discuss the matter further as to whether the jury would have been justified in finding that he had made his election even if they believed the testimony that I have recited, or whether there should have been shown some positive act of actually resulting possession, or the taking some action in Court or otherwise, by which his intention to avail himself of his option of re-taking the property and disregarding the levy was thoroughly evinced. That question does not necessarily present itself so as to require a direct holding here. The Court of Common Pleas evidently based its ruling upon the idea that there was a conversion and that an action had arisen and that it made no difference even if the officer was somewhat lax afterward in maintaining possession of the property, and in appointing a custodian for it; and, while we have found great interest in hunting up the authorities and in considering them, we are clearly of the opinion that the Court of Common Pleas was correct in its judgment, and that the judgment should be affirmed, and it will be so ordered. There will be no penalty other than a judgment against the plaintiff in error for costs.

S. M. Young, attorney for plaintiff in error.
Andrews Bros., attorneys for defendant in error.

CHILDREN

Born out of Wedlock are, by Subsequent Marriage of Parents, Legitimate.

(Huron County Circuit Court, May Term, 1894.
Present: Hons. C. S. Bentley, P. J., C. H. Scribner
and G. R. Haynes, J. J.)

Arminda C. Kniffin vs Josephine B. Schaffer, et al. Appeal from Huron County Common Pleas Court.

(Under Section 4773 R. S. children born out of lawful wedlock, whose parents subsequently intermarry, are deemed legitimate and the meaning of that statute is that such children shall be regarded, in all respects, precisely as if the marriage had occurred before instead of after their birth. ED LEGAL NEWS.)

SCRIBNER, J.

This is a proceeding which comes into this court by way of appeal from a judgment rendered therein by the court of common pleas.

On the 22nd day of January 1877, one Benjamin Kniffin then in full health, and a resident of Huron County, executed in due form, his last will and testament. At that date, he was the owner of a large body of real estate situated in Huron County as well as a considerable personal property. He left surviving him several children, perhaps five in number. He died July 12th, 1877. His will was admitted to probate on the 30th, of July 1877. By that will, which appears to have been very carefully prepared, the testator disposes of a large body, if not the whole of his large estate. The clause material to be considered in disposing of the principal question here presented, is as follows: "To my son, Charles B. Kniffin, I do further give, bequeath and devise for, and during the time of

his natural life, the entire use, benefit, custody and control of 133 $\frac{1}{3}$ acres of land situated in my said old farm, consisting of 400 acres of land lying east of and adjoining said last before mentioned 133 $\frac{1}{3}$ acres of land; in case my said son, Charles B. Kniffin, shall have lawful heirs of his body begotten, then, and in that case, I do give and devise the said land to him in fee simple; and in case my said son, Charles B. Kniffin, shall die having no lawful heirs of his body begotten, then, and in that case, in all respects subject to his having the use and benefit of the same during his life-time as aforesaid, I do give and devise the said land to all my grand children living at the death of my said son Charles B. Kniffin which shall be children of my children now living, to be equally divided amongst them."

Charles B. Kniffin died on the 4th, of August, 1893 without issue and according to the express terms of that portion of the will which I have just read, Charles B. Kniffin never having had lawful heirs of his body begotten, the said tract of 133 $\frac{1}{3}$ acres of land passed, by the terms of his will, to his grand children living at the death of his said son, Charles B. Kniffin, "which shall be children of my children now living to be equally divided amongst them."

The present proceeding, as I have stated, is an action in partition brought by Arminda C. Kniffin against Josephine C. Schaffer, Benjamin F. Kniffin Junior, aged 20 years, Harry W. Kniffin, aged 18

years, Alta Kniffin, aged 16 years, Clarence Ingersol, aged 19 years, Florence Ingersol, aged 17 years, Benjamin K. Kryster and George Kniffin, Defendants. These 9 persons, it is alleged by the plaintiff, constitute the grand children of the deceased testator, living at the death of the said Charles B. Kniffin, and they are the children, as it is alleged upon the part of the plaintiff, of the children of the testator living at the date of the execution of the will. No question is made but what these 9 persons named in the petition, are the children of the children of the testator who were living at the date of the execution of the will; but as to five of these parties, including the plaintiff, Arminda C. Kniffin, it is insisted, upon the part of the remaining four, that they do not come within the terms of the will, and for this reason: Their father, Benjamin F. Kniffin, who was named as one of the devisees in the will, and as one of the executors of it, lived and co-habited with the mother of these children for many years before there was any actual, lawful marriage. They were married on the 9th, of May, 1876 in the State of Michigan. The youngest of the five children was born March 11th, 1877, some 10 months, or thereabouts after the marriage which is proved to have taken place in the State of Michigan. The other four children were born before marriage and, therefore, out of lawful wedlock. But the marriage having taken place in due form as is shown by undisputed testimony in the case, the question arises, under the statute as to whether or not

they are within the terms of the devise.

Section 4175 of the statute provides as follows: "When a man has by a woman one or more children, and afterwards inter-marries with her, such issue, if acknowledged by him as his child or children, shall be deemed legitimate; and the issue of parents whose marriage is deemed null in law, shall nevertheless be legitimate."

There can be no question but that all these children were acknowledged by Benjamin F. Kniffin, their father. The man and the woman lived and cohabited as husband and wife. They lived for sometime in Huron County where one child was born. They lived for years thereafter in William County where the remaining four children were born. They lived and were treated and apparently regarded as of one family, as is ordinarily the case when a man and woman have been duly married, the father recognizing the children as his own and treated them in all respects as if born in lawful wedlock.

It is insisted, upon the part of the four grandchildren whose legitimacy is unquestioned,—the four parties here, that the marriage of the father and mother of the five children of Benjamin F. Kniffin, does not entitle them to come into the benefits arising under clause 12, of the will.

It will be remembered in this connection, that the marriage occurred before the date of the will, necessarily therefore, long before the death of the testator. It does not

appear whether or not the testator had knowledge of this marriage. It may be a matter of considerable doubt as to whether he did have that knowledge, for it appears from the direct testimony of several of the family of Benjamin F. Kniffin that they had no such knowledge until after the commencement of this proceeding; but whether or not the testator had this knowledge we do not deem very material. We must look to the terms of the will to ascertain what shall be the proper effect given to it. I repeat, the language of the statute is: "When a man has by a woman one or more children, and afterwards intermarries with her, such issue, if acknowledged by him as his child or children, shall be deemed legitimate." What meaning is to be attached, by these terms, if they are to be *deemed legitimate*? They are precisely as if the marriage had occurred before their birth. There can be no distinction taken, unless we, in some manner, treat the statute as not meaning what it purports to mean. There can be no question about it in our minds, but that these children are in all respects to be regarded precisely as if this marriage had occurred before their birth instead of after.

A case arose a number of years ago in Knox County, under what is now made the concluding sentence of this section: "The issue of parents whose marriage is deemed null in law, shall nevertheless be legitimate."

In disposing of the case reported in the case of *Wright vs Lore*, 12th,

Ohio State, page 619 the court says, according to the note appended to this section: "W. was married in Canada in 1822, and the issue of that marriage was the plaintiff. In 1833, his wife still living, he came to Ohio and married another woman, she being ignorant of his former marriage. They cohabited together as husband and wife, and had issue, four children. W. died in 1843, seized of the land in dispute, and these four children conveyed their interest to the defendant. The act of 1831, was substantially the same as the section to which this note is appended. *Held*, that the expression, 'deemed null in law' is not confined to marriages which are voidable and require a judicial sentence to establish their nullity, but that the innocent children of the marriage *de facto*, although that marriage must be deemed in law a nullity, come within the letter and spirit of the enactment."

In this case, if any one is to suffer, it must be the children of this marriage, who were utterly innocent of any wrong-doing, or any violation either of the law, or those rules which should govern a well ordered community. The children are not at fault for any wrong or mistake of their parents.

The law seeks to relieve the children from the consequences that would otherwise attach to the meretricious action of the kind shown in this case.

We have no doubt, in conclusion, that the five children, not only the child that was born after the marriage, but the four children who

were born before the marriage, are to be considered in a proceeding of this character, just as much the legitimate children of this marriage which subsequently took place, as if the marriage ceremony had occurred prior to the birth of the children. It follows therefore, from these facts and considerations, that the plaintiff is entitled to partition of the 133 1/3 acres of land as prayed for in the petition, and the order will be accordingly. The court will see that the proper commissioners are selected and the proper entry made.

L. D. Strutton, atty for plff and the other children of B. F. Kniffin.

Stewart & Rowley, attys for other defts.

FOREIGN EXECUTIONS.

(Huron County Circuit, May Term 1894—Present: Hons. C. S. Bentley, P. J., C. H. Scribner and G. R. Haynes, J. I.)

Laundon, Windecker & Co. vs Joseph A. Denman, et al. Appeal from Huron County Common Pleas.

(Laws enacted by the Legislature concerning the record to be kept of Foreign Executions, contemplate furnishing every facility that is practicable to the party who seeks information. The index to such Foreign Execution docket must show the names of all parties to the judgment and a failure to comply with this, or other requirements of the statute will defeat the lien of such judgment as against subsequent purchasers or creditors. ED LEGAL NEWS.)

HAYNES, J.

The case of Laudon, Windecker & Company against Joseph A. Denman and others is one that comes into this court by way of appeal and has been heard upon the evidence and the arguments of counsel. The petition was filed originally by the plaintiffs for the purpose of enforcing a certain judgment,

and also for the purpose of marshaling liens upon certain real estate situated in the county of Huron. In regard to quite a number of liens there is no controversy. The main controversy submitted here for our decision is upon the alleged lien acquired by the plaintiffs by virtue of a certain levy caused to be made upon the property of the defendant by the name of Monett, Cashier, upon a certain mortgage which he holds against the property, and executed by the parties who are the defendants.

It appears by the evidence offered, that on the 31st day of March, 1890, the plaintiffs obtained a judgment against Joseph A. Denman and Frankie L. Denman in the Court Common Pleas of Sandusky county in the sum of \$1,375; that thereafter, execution was issued from the Court of Common Pleas of Sandusky county to the sheriff of Huron county which was received by him on the 1st day of April, 1890; that, by virtue of that execution, he made a levy upon the property in question.

It further appears by the evidence that upon the 9th day of December, 1890, the defendant, W. O. Monett, Cashier, received from the defendants, Joseph A. Denman and Frankie L. Denman, two promissory notes of that date, one for \$1,500 payable in one year after date, and one \$500, also payable in one year after date with interest. To secure those notes a mortgage was executed as of that date by the defendants, Joseph A. Denman and Frankie L. Denman upon the property in

question, being the property of Frankie L. Denman, and the mortgage was delivered accordingly.

It further appears, that at the time the sheriff of Huron county received the execution in question, he made an entry upon the foreign execution docket of Huron county, wherein he, under the head of "names of parties," put down the names of Samuel K. Laundon and others against Joseph A. Denman, and that was all. The word "execution," the county from which it was issued, the date of the writ, when received, the date of the judgment, and the amount of the judgment were also entered at that time. The copy of the return was entered on said docket as follows: "This writ received on the first day of April, 1890 at 9 o'clock a. m. and levied the same on the following described real estate as instructed by plaintiff in person, April 2nd, 1890, as described in the schedule marked 'A, B and C, hereto attached, and made part of the return.' And such schedules were copied showing a description of the property, and under the return was added, 'This writ returned by order of the plaintiff in person.'"

Testimony was offered upon the hearing of the case in regard to the knowledge that Monett had, or did not have in regard to this judgment and execution and of this levy; also as to the knowledge that Denman himself had of the judgment.

It appears from the testimony that Denman had no knowledge of the judgment, neither did Monett, or any of those acting for him, have

any knowledge of the existence of this record upon the foreign execution docket, or of the judgment, or of the levy.

Some evidence was offered tending to show that upon the trial of this case in the Court of Common Pleas, Denman testified that he and Mr. Charles H. Stewart who was connected with the loan, perhaps, as attorney for Monnet, came to the court house and examined the records or to see the records. But, whatever the testimony may have been at the trial in the court of common pleas, the witness stated here that he had no recollection of any such examination and affirmatively testified that he had no knowledge of the judgment at the time he executed the notes and mortgage.

There being then no actual notice of the existence of this record, the question stands upon the effect that is to be given to this record, under the statutes of the State of Ohio.

It was further shown in regard to the entries on the foreign execution docket that the name of Frankie L. Denman was not entered on the execution docket until sometime after the execution of this mortgage. Neither was her name entered upon the index in the foreign execution docket until after, or at the same time it was entered upon the docket itself, to wit, after the notes and mortgage were executed. The name, however, of Joseph A. Denman was entered upon the index at the proper time and place. It will be noted that in the levy which was made, that I have read, that it does not state on whose property this

levy was made. It does not state that this levy was made upon this real estate as the property either of Joseph A. Denman or Frankie L. Denman. The first mention that is made of the name of Frankie L. Denman is to be found in the description of one or two pieces of property, wherein it was stated that in a partition that was made sometime before, there was set off to Frankie L. Denman from said property certain parts or parcels of it.

It is contended upon the part of the counsel for Monett that this record is wholly void, or at least it is of no effect as to any notice to Monett, Cashier; that it does not effect the rights that he has in these notes and mortgage; that he is entitled to be paid before the plaintiffs are paid the amount of their judgment out of the proceeds of the sale of the property.

Upon the other hand, it is claimed upon the part of the counsel for plaintiffs, that the entries are sufficient,—a sufficient compliance with the requirements of the statutes of the state and that they constitute an entry and constitute a valid notice in law as against Monett, Cashier; that they are constructive against him; that by virtue of this, by force of the statute, the plaintiffs are entitled to payment out of the proceeds of the sale of the land.

It calls for a construction of the statute. Section 1212 is the one that is relied upon: "There shall be kept in the office of the sheriff of each county a foreign execution docket, to be furnished at the cost

of the county, in which docket the sheriff shall, on the receipt by him of any execution, order of sale or other process issuing from any court of any county of the state, other than that in which he resides, make an entry of the date of such writ, when received by him, from what court and county issued, the date and amount of judgment or decree; also copy in such book the full description of the property and real estate which he levies upon or offers for sale, the same as is endorsed upon or contained in such writ; also copy into such book his return on such writ when he makes the same, including the bill of costs; and shall for the use of the persons entitled to the same, retain all fees due in such cases to residents of his county, and pay the same over on demand to such persons, and shall make a direct and reverse index of each case so entered; and such entries so made, shall be notice to subsequent purchasers, and creditors of the matters contained therein."

It is claimed by counsel for the plaintiffs that all that was necessary under that statute, was that the sheriff should enter upon the docket only the date of the writ, when received by him, from what court and county issued, and the date and amount of the judgment or decree, and a full description of the property and real estate which he levies upon or offers for sale, the same as is endorsed upon and contained in such writ; also copy into the book the return on such writ, when he makes the same, including the bill

of costs, and that, when he has done that, it is sufficient.

On the other hand, it is claimed by the counsel for the mortgagee, that the names of the parties should be entered upon the docket and should be contained in the direct and reverse index, that is required to be made, and that when that is done, it shall be notice to subsequent purchasers and creditors of the matters contained therein and until that is done, it is not notice to such subsequent purchasers and creditors.

It will be observed that the statute does not mention anything about the names of parties. Upon examination of the statute, the language is, "that the sheriff shall make a direct and reverse index of each case so entered."

It is claimed upon the part of counsel for plaintiff that the word "entry," "when such entry is made," only refers to those matters contained in the statute that come under, and are mentioned there, as we understand it, under the term "entries."

The language of the statute is that "he shall make an entry of the date of the writ, when received by him, from what court and county issued and the date and amount of the judgment or decree," and next, "he shall copy in such book the full description of the property and real estate which he levies upon or offers for sale & etc." Third. "That he shall make a direct and reverse index in each case so entered," using the words, "entries," "copy" and "index."

The question is made as to the

validity of this levy, being, as is termed a mere office or paper levy, but we are of the opinion that the case of *Morgan vs Kinney* in the 38th, Ohio State, page 610, settles that question that so far as the levy itself is concerned, it was a valid levy.

Coming back now to the statute: we have given the matter a very faithful and careful consideration, and have endeavored, in coming to a conclusion in regard to the proper construction of the statute, to look at the purposes and objects for which the statute is made, and the necessity for such a statute and the probable effect that the legislature supposed would be given to it by parties who would have occasion to search the records, and also by the courts.

We are of the opinion that the foreign execution docket should show in the entries of the executions, the names of the parties, that when it requires of the court or of the sheriff that he shall make an entry of the date of the writ, when received by him and from what court and county issued, and the date and the amount of the judgment or decree, that the intention is here to enter such statements in regard to the execution, as will certify to any party who has occasion to examine the record as to who the parties to the execution are, as well as the amount of the execution, and the action taken by the sheriff under the execution.

Coming now to the matter of indexing, it will be observed that it is not stated what the index shall be

or what it shall consist of except that he shall make a direct and reverse index of each case.

The first matter in a case in court are the parties to the case, the person whose favor the judgment is rendered, and against whom judgment is rendered. It seems to be natural and just conclusion that in making an index of any case, it should be an index of the names of the parties, and we think further, that the intention of the legislature was that, the index being made of the parties, it should become a source of information to any person or persons who should make an examination: indeed, in the natural order of things, a party would go to the index for the purpose of ascertaining whether there was an execution of that kind; whether an execution had been ordered, and whether an execution of that kind had been recorded in the foreign execution docket against a party from whom he was asking, or might expect to take a lien upon land.

Were it not that an index were required to be made and were it not that the names of the parties were placed upon the index for his information, he would be compelled to go to the foreign execution docket, and examine it from beginning to end, each case separately, for the purpose of ascertaining whether a particular piece of land had been levied upon and in looking at that, he would naturally first look to see if the names of the parties were not required to be there, were not required to be in

the index, the only thing he could find or expect to find would be the description of the property itself. The name of Frankie L. Denman being left out, for instance, in the index in the execution docket, in making an examination of this record, he would not learn from it that this property had ever been levied upon as the property of Frankie L. Denman; he would not learn that there was any judgment that had been rendered against her; that the plaintiff was claiming any lien by virtue of his execution as against her, save and except this, that this execution for \$1,375. in favor of somebody had been levied upon this land.

Now the object and purpose of this statute undoubtedly is to enable a party to have, within the limits of the country wherein the land is situated, such a record of the case that any person who desires to obtain security or take a mortgage from a judgment debtor, may ascertain whether there is any lien of that kind upon the land upon which he proposes to take a mortgage, or of which he proposes to make a purchase, and the general scope and policy and purpose of the legislature of this state is, as shown by the various enactments in the state, to have a record of the levy itself and also an index, and every facility furnished that is practicable, to the party who seeks to search the record and obtain the information he desires to obtain.

We have come to the conclusion therefore, that the claim made by the counsel as to the construction

to be given to this statute, that when there is an entry made, of the names of parties upon the foreign execution docket, with the other matters that are directed; also when there is made a direct and reverse index of each case so entered, including the names of the parties, and, of course, the names of all the parties,—that when such entries are made,—“so made,” that they shall be notice to subsequent purchasers and creditors, of the matters therein, is that the term “entry” included in the statute is intended to include all these respective and various matters. If our view of the construction of the statute is correct, it follows that the lien of the plaintiffs here must be postponed to the lien or the mortgage of Monett. He claims to be a bona fide purchaser for a valuable consideration. The testimony shows that the mortgage was taken in part for obligations that were owing to him by Denman and in part for moneys that were paid to Denman at that time. There was a surrender of prior notes and there was an extension of time from that time forward, so that the party himself within the description of a bona fide purchaser for a valuable consideration.

There was an issue made as to whether the mortgage had been paid or not. Some evidence was offered tending to show that payments had been made arising from collateral securities that were held by the Savings Bank to be applied upon this mortgage. It is sufficient to say that it is not shown that the

whole mortgage is paid and perhaps but a small portion of it. We have made no computation of that matter because counsel who are familiar with the evidence, can do that as well as we, and a decree may be taken in accordance with the general rules stated in the opinion.

C. P. Wickham, atty for plffs.

G. T. and C. H. Stewart and C. L. Kennan, attys for defts.

Our thanks are due to W. C. Rogers, of Cleveland, for the following opinion.

EVIDENCE — BOOK OF ACCOUNT.

(In the Circuit Court of Cuyahoga County, O.)

1241. Cora Hough, plff in error,
vs William J. Henk, Adm'r., deft in error.

Friday, June 15th, 1894.

HALE, J.

The only substantial error claimed in this case is, that the court below excluded what was termed an account book from consideration as evidence. The book was offered on the ground that the action was founded upon an account. The action being against the administrator to enforce the allowance of the claim, and the plaintiff in the action being disqualified as a witness because of the opposite party being an administrator, the plaintiff sought to establish the fact that her book was a book of original entries and introduce the same to substantiate the claim.

First, the claim was one for money loaned, as shown by the petition. She seeks to show accounts upon a cause of action that

on such dates the plaintiff loaned so much money and the party agreed to pay it back, but the petition sets forth no copy of the account whatever. This is one consideration.

Second, the items are for money loaned—no mutual dealings between the parties—simply items of money loaned; which we do not think a proper subject-matter of book account under the circumstances of this case.

There was another claim made in the case, to-wit: For board which was claimed to have been furnished by the plaintiff to decedent, but that does not arise under this question. That claim was attempted to be supported by other evidence, and the copy of the book offered does not contain that item. So that in the exclusion of the account offered, it had no reference whatever to the item for board.

There is no other material error claimed in the case. Certain it is that the testimony after the exclusion of that book, failed to establish the claim of the plaintiff, or, in other words, was not so clearly established as to authorize us to reverse the judgment of the court below; so the judgment of the Court of Common Pleas is affirmed.

SUPERIOR COURT OF CINCINNATI—SPECIAL TERM.

The Act Repealing Struck Jury Law Does Not Affect Cases Pending at the Date of its Passage.

44739. McDonald vs Lane & Bodley.

SMITH, J.

This action has been at issue for

some time, has been twice tried before struck juries, and upon both trials the jury has disagreed.

The case having been called again for trial yesterday upon the regular calendar, counsel for defendants having directed attention to the fact that their demand for another struck jury is on file and was on file prior to the date of the passage of the recent act of the General Assembly repealing the struck jury law, they therefore ask that the case be transferred to the list of struck jury cases, and that they be given the right to a trial before a struck jury.

The plaintiffs resist this application and deny the right of the defendants to a trial before a jury other than the regular one, drawn from the wheel as provided by law.

The decision of the motion depends upon the construction of the act repealing the law providing for struck juries, which former act "must be read as though section 79 was appended to it as a saving clause." *Bode, administratrix, vs Welch*, 29 O. S. 21.

The act in question simply repeals outright the sections providing for struck juries, and makes no reference to pending actions or proceedings.

Section 79 is as follows:

"Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecutions or proceedings civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions

or proceedings, unless so expressed; nor shall any repeal or amendment affect causes of such action, prosecution or proceeding existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

This section grew out of the act of February 19, 1866, which read as the section now reads, except that the words, "and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions or proceedings unless so expressed," was not in the act and was not inserted until the revision of the statutes of 1880, where it has since remained unchanged.

The amendment of 1880 was doubtless suggested in part by the decision of the Supreme Court in *Warner vs Railroad Company*, 31 O. S., 265, in which it was held that a statute changing the number of jurors in a jury trial before a Justice of the Peace from twelve to six applied to pending actions, because such law related to the remedy, and the statute of 1866 did not apply to repeals of acts remedial in their nature. The amendment of 1880 corrected this defect in the act of 1866, and since 1880 no law relating to the remedy shall affect pending actions and proceedings unless so expressed.

There can be no dispute that this case was a pending action at the time this law was passed repealing the struck jury law; and, in view of the decisions of our Supreme Court, there can be no doubt, in my opinion, that it is remedial in its nature.

It is not necessary, in the decision

of the question presented by this motion, to undertake to give a comprehensive definition of the word "remedy," as used in section 79, by which every law of doubtful remedial nature may be tested, and its character as a remedial statute or otherwise may be determined, because the decisions of the Supreme Court have settled the question that matters relating to the impanneling of the jury are matters pertaining to the remedy. And it is also settled that other matters relating to the trial, such as the right to file petition in error and the right have a cause removed for trial to an adjoining county on account of the interest by the judge in the pending cause, are laws relating to the remedy and controlled by section 79: *Arrowsmith vs Hamering*, 39 O. S. 596; *State ex rel Construction Company vs Rabbits*, 46 O. S., 178.

The decisions relating to the impanneling of the jury to which I previously referred are *Hartnett vs State*, 42 O. S., 568 and *Palmer vs State*, 42 O. S., 596.

By an amendment to section 7278, passed March 18, 1884, and commonly know as the Prudent Jury Law, certain grounds of challenge which, before this law, the parties were entitled to, were taken away from them. *Hartnett* and *Palmer*, against whom prosecutions were pending for murder in the first degree at the time of the passage of this law, were, against the objection of their counsel, nevertheless tried as though such law applied to them. Their convictions, however, were reversed upon the

ground that the law relating to the right of challenge of a juror was one which affected the remedy; and that as it had not in express terms been made applicable to pending prosecutions, it was error in the lower court to so apply it.

In the Hartnett case, Follett, J., says in the syllabus:

"By virtue of the Revised Statutes, Section 79, in impaneling a jury for the trial of a person accused of a crime and against whom the prosecution was pending when section 7278 was amended March 18, 1884, such accused person is not precluded by that amended act from using causes of challenge allowed by the section thus repealed."

And in the Palmer case, Judge McIlvaine said:

"The judgment below must be reversed for another error appearing in the record. The defendant was tried in June, 1884, and the jury was impaneled under the Pruden law, which was passed on March 18, of that year. The crime for which the accused was tried and convicted, was committed in December, 1883, and the prosecution of defendant therefor was commenced soon thereafter, the first indictment being found against him jointly with one Berner, for the crime of which he was convicted in January, 1884. This indictment having been destroyed by fire, another indictment for the same crime was returned by the grand jury in May of the same year. The Pruden law was passed after the prosecution had commenced, and

while it was pending. The Pruden law repealed the original section, 7278, of Revised Statutes, which was in force at the time the crime was committed, and when the prosecution therefor was commenced, and for some months while such prosecution was pending in the Court of Common Pleas of Hamilton County."

Then, quoting section 79, he continues as follows:

"By this section it is quite clear that the Pruden law had no application to the prosecution of plaintiff in error, which was pending before its passage.

"The repeal and amendment of section 7278 related to the remedy for the offense that was then being prosecuted against the plaintiff in error, and it was not expressed in the amended act that it should have effect in pending prosecutions.

"It follows, therefore, that the jury in this prosecution should have been impaneled in accordance with the provisions of the repealed section."

These decisions, aside from the fact that they relate generally to the impaneling of the jury, are especially in point, for the reason that the particular point with reference to the impaneling was the matter of challenges, and in the struck jury the right of peremptory challenges is quite different from that in the regular jury.

For the reasons stated I am of the opinion that, inasmuch as this law relates to the remedy and does not expressly relate to pending actions, it cannot be so held to ap-

ply, and that, in the language of our Supreme Court in *State ex rel vs Rabbits*, "no generality of language nor use of the present tense can be accepted by the courts as a substitute for such express indication of the legislative intent. This, we think is the only proper construction to be given this clause in the above quoted section (79). The provision has not merely the advantage of being a rule of certainty in construction, but also of exciting the attention of the Legislature and begetting an inquiry as to the propriety of applying a given amendment of a remedial nature to pending actions, prosecutions or proceedings."

Motion to send cause before a struck jury granted.

Thomas McDougall and Willis M. Kemper, for the motion; Follett & Kelley, contra.—Court Index, Cin., June 6 '94.

SUPERIOR COURT OF CINCINNATI—SPECIAL TERM.

Equity Power of Court to Appoint a Receiver.

HUNT, J.

In the case of *Doane vs Donogh*, Judge Hunt held that the usages of courts of equity as to the manner of appointing a receiver, where it is not otherwise provided by statute, is applicable to cases arising under the code. This is an action to sell a leasehold estate for the non payment of rent, to secure which a lien was reserved. The rent is payable quarterly, and there is a balance due on the September payment, as well as a default for the full installments

payable in December and March following.

It was the contention of defendant that no power existed in the court under section 5587 to appoint a receiver, inasmuch as this was not one of the cases enumerated under this section.

Paragraph 6 of this section vests in the court the power to appoint a receiver "in all other cases where receivers have heretofore been appointed by the usages of equity."

The court, following 31 O. S., p. 7, decided that a provisional receivership is something more stringent than even an injunction. It should only be granted in cases of apparent necessity. It is an equitable remedy, and stands in a similar relation to courts of equity that proceedings bear to courts of law.

To deny a receiver in this case would be to cast upon the plaintiff the whole hazard of a situation caused by the default of the defendant, and, in effect, would permit the defendant to profit by every delay that might be interposed to the progress of the case.

Motion granted.

Bateman & Harper for motion.

Chas. J. Hunt, contra.

Court Index, Cin., June 18, '94.

FOREIGN CORPORATIONS.

An act to further supplement sec. 148 R. S. as follows: Sec. 148c. Every foreign corporation, incorporated for purposes of profit, now or hereafter doing business in this state, and owning or using a part or all of its capital or plant in this state, shall within 30 days after the passage of this act, or in case of a company hereafter coming into this state, then before it proceeds to do any business in this

state, under the oath of the president, secretary, treasurer, superintendent, or managing agent in this state, of such corporation, shall make and file with the secretary of state, a statement in such form as the sec'y of state may prescribe, containing the following facts:

(1.) The number of shares of authorized capital stock of the company and the par value of each share. (2.) The name and location of the office or officers of the company in Ohio, and the name and address of the officers or agents of the company in charge of its business in Ohio. (3.) The value of the property owned and used by the company in Ohio, where situated, and the value of the property of the company owned and used outside of Ohio. (4.) The proportion of capital stock of the company, which is represented by property owned and used, and by business transacted in Ohio.

From the facts thus reported and any other facts coming to his knowledge hearing upon the question, the secretary of state shall determine the proportion of the capital stock of the company represented by its property and business in Ohio, and shall charge and collect from the company for the privilege of exercising its franchises in Ohio, one-tenth of one per cent. upon the proportion of the authorized capital stock of the corporation, represented by property owned and used, and business transacted in Ohio, being the same fee required to be paid by corporations formed under the laws of Ohio. Upon the payment of the said amount the secretary of state shall issue to the foreign corporation a certificate that such corporation has complied with the laws of Ohio, and is authorized to do business therein, stating the amount of its entire capital and of the proportion which is represented in Ohio. Provided, this section shall not apply to foreign insurance, savings and loan, or building and loan companies, or to express, telegraph, telephone, railroad, sleeping car, transportation, or other corporations engaged in Ohio in interstate commerce business, or to foreign corporations entirely non-resident, soliciting business or

making sales in this state by correspondence or by traveling salesmen. Any foreign corporation shall have the right on application to be heard by the secretary of state touching the matter of the disbursement or of the proportion of its capital stock represented by property used and business done in Ohio. Any corporation aggrieved by the decision of the secretary of state, may, within 10 days, appeal to the auditor of state, the treasurer of state and the attorney general whose decision in the matter shall be final. Every foreign corporation subject to the provisions of this section, which shall neglect or fail to comply with its requirement, shall be subject to a penalty of \$1,000, and an additional penalty of \$1,000 for every month that it continues to transact any business in Ohio without complying with the requirements of this section, to be recovered by action in the name of the state, and on collection paid into the state treasury, to the credit of the general revenue fund. The attorney general, on the request of the secretary of state, shall institute such action in the Court of Common Pleas of Franklin county or of any other county, in which such corporation has an office or place of business, as he prefers. No foreign corporation subject to the provisions of this section shall maintain any action in this state upon any contract made by it in this state after the time fixed by this act for a compliance by such corporation with its requirements, until it shall have complied with the requirements of this act, and procured the requisite certificate from the secretary of state. Every corporation which has filed its statement and paid the privilege tax under this section, and which thereafter shall increase the proportions of the capital stock represented by property used and business done in Ohio, shall within 30 days after such increase, file an additional statement with the secretary of state, and pay a fee of one-tenth of one per cent. upon the amount of increase of its capital stock represented by property owned and business done in Ohio. All fees collected by the secretary of state under this section

shall be paid by him into the state treasury, to the credit of the general revenue fund. Every corporation subject to the provisions of this section which complies with its requirement shall not be subject to process of attachment under Sec. 5521, R. S., or any law of Ohio upon the ground that it is a foreign corporation or a non-resident of this state. (Passed May 16.)

A SUMMER LOVE FEAST,

In looking through the decisions of Courts of Northwestern States a topic very frequently encountered is "Logs and Logging." Quite a large number of such cases arise out of "log jams." Logs are floated down tributary streams on spring freshets until they gorge and close a river, then ensue litigations over belated logs and injured loggers. The condition of the calendar and the general conduct of the Bar, in this county during the month of June, suggests an analogy to the log jam. Causes have been tided over previous terms without losing their places, and when June at last arrives there comes the realization that the present term offers the last chance before vacation. Then ensues a veritable case jam, every attorney doing his utmost to force into the first narrow current of progress the case which procrastination or good nature has permitted to remain stagnant throughout the spring. The extraordinary spurt of energy rarely accomplishes extraordinary results. The Judges, with the systematic industry of men whose effort is regulated by agencies outside themselves, have been steadily working throughout the Court year; and it is not at all to be wondered at that they feel no special stimulation upon the arrival of the month of June, especially if the temperature be as debilitating as that of a few days ago. In June, as in any other month, the volume of litigation actually disposed of, as com-

pared with the vast mass on the calendars, may be likened—to change the figure—to the small stream flowing from the mouth of a glacier.

To many members of the Bar who fail to get cases on before vacation we make a practical suggestion. We are addressing the average practitioner, not him whose time is in a peculiar sense money; who, by reason of many retainers to come into certain cases and keep him out of others, can sit down and measure his certain income by the tick of the clock or his own heart-beats. To the average practitioner we suggest that the early summer offers a good occasion for the settlement of cases. We have no doubt that the average lawyer, on looking over his register, can pick out one or several cases which it would be advantageous for Mr. Doe on one side and Mr. Roe on the other to have disposed of forthwith. Of course, in many cases, Mr. Roe, the defendant, has been fighting purely or partly for delay, and may pay in full after trial in the autumn and affirmance on appeal several months later. But, in the meantime, Mr. Roe may die, or fail, or transfer his property to Mrs. Roe, who happens to be very glib and plausible and fascinating.

Lawyers do not hibernate during the summer—the bull our own—as many laymen seem to suppose, but must eat and drink, and they like to be merry. The wherewithal derived from settled cases may not be as great as from won cases, but who can guarantee victory save the fickle and envious gods? We soberly believe that the average practitioner could not devote the next few weeks to any better purpose than procuring substantially just and fair settlements of existing litigations that offer any promise of being so adjusted. Professional tact may not unconsciously be

employed in causing each principal combatant to believe that he secures peace with honor.—N. Y. Law Journal.

TYNDALE PALMER'S SUITS.

The libel suits of Tyndale Palmer against newspapers throughout the United States are melting away without much ado. One brought in another county was dismissed last week for failure to prosecute and the one commenced in Lucas County against The Blade was dismissed the other day.

It was assigned for trial twice and security for costs was given but it was developed that the petition, a printed form, contained a copy of an Associated Press dispatch which the defendant never published. Plaintiff's attorneys discovered the error after the suit was filed but did not ask leave to amend until the case was called for trial.

In passing upon the motion at that time the Court, Pugsley, J., intimated that there might be some doubt as to whether plaintiff at any time would have a right to substitute one libel for another; without deciding that question the Court declined to permit plaintiff to amend at such a late date and the case being pressed for trial was dismissed for want of prosecution. Inasmuch as the suit was brought only a day or two prior to the expiration of the time allowed for such actions, Palmer's claim is now barred by the Statute of Limitations.

U. S. Circuit Court.

Filings.

1058—Kennedy vs Solar Refg Co; stipulation extending time of examination of compt as to his ability to give security for costs to June 25th, 94.

1114—Toledo vs Burwell et al; motion for new trial by B. E. Bullock and P. D. Newton; King & Tracy and A. L. Smith, attys.

394—Central Trust Co. of New York vs Ohio Central R. R. Co; certified order for service on New York defendants returned and filed.

1218—Leavens et al vs Bronson et al;

answer and cross-petition of Sarah Bronson, gurdn.

1182—Farmers L. & T Co. vs T A & A N M Ry Co. Amendment of answer of Recr to int petn Post, Martin & Co. A. L. Smith and J. H. Doyle, attys.

1120—Jos A. Beauvais & Co. vs The Elec Rway & Power Co. Motion for leave to file amended answer and cross bill. Doyle, Scott & Lewis, attys.

1128—DeLaVergne Refrig Mach Co vs Toledo Brew & Malt Co. Stipulation for settlement.

1229—Gawlack admr vs The M C R R Co. Affidavit of E. D. Potter Jr. atty for deft concerning failure to file transcript from Common Pleas court.

1159—Crowe admr vs M C R R Co. Reply. Harvey Scribner, atty.

1128—De La Vergne R. M. Co. vs Tol B & M Co. Case dismissed on stipulation for settlement.

1231—In Re. B. C. Faurot, as agt of shareholders of the Lima N. Bk. Ptn for authority to sell real estate. Cable & Parmenter, attys.

964—Geo. W. Harshman vs John A. Nash, et al. Receiver's report. Receipts \$3,286.70. Balance in Receivers hands \$114.67.

964—Same vs same. Receivers report confirmed.

1072—Harvey vs The B & O R R Co. Petition and order of revivor in name of David Joy, Adm'r.

1120—Jos A. Beauvais vs The Elec R & P Co. Motion for order to file amended ans & cross ptn allowed.

1218—Leavens vs Bronson et al; cross bill of First Natl Bank of Defiance; Harris & Cameron, attys.

1218—Same vs Same; motion for service on J. R. Shaver et al; Harris & Cameron, attys for First Natl Bank.

1218—Leavens et al vs C. E. Bronson et al. Order for service Jos R. and Lucinda Shaver on cross bill of 1st Natl Bank of Defiance.

1182—The Farmers L. & T. Co. vs T. A. A. & N. M. Ry. Co; incruening petition of Washburn & Moen Mfg Co; C. S. Ashley, atty.

1130—The Genesee Salt Co vs H. F. Burnap et al; depositions in behalf of defts.

U. S. District Court.

In Admiralty.

175—Conrad vs Barge Brooklyn. Sold to F. G. Ashley for \$360.

Criminal Docket.

902—Albert Munchausen, counterfeit-ing, verdict guilty on 2nd and 4th count.

Toledo Legal News.

OFFICIAL LAW JOURNAL OF LUCAS
COUNTY, OHIO.

In the matter of the designation of a daily Law Journal in Lucas County. As required by Sec. 1 of an Act passed April 14th, 1884 and amended Feb'y 25, 1886, entitled "An Act relating to the posting of court calendars and legal notices in certain counties," as amended May 9, 1894, the Judges of the Courts of Record in said County other than the Circuit Court, hereby jointly designate the TOLEDO LEGAL NEWS, a daily law journal published in said County, as the journal wherein until the further order of said judges, shall be published all the notices, advertisements, abstracts and matters and things specified or referred to in said Section 1.

Approved: **SILBERT HARMON,**
REUBEN C. LEMMON,
ISAAC P. PUOSLAY,
Judges of Common Pleas.
I. T. McLEARD, Probate Judge.

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SATURDAY, JUNE 30, 1894.

MEETING OF STATE BAR ASSOCIATION.

The following invitation has been sent out for the annual meeting of the Bar Association:

AKRON, O., June 25, 1894.

The XVth Annual Session of the Ohio State Bar Association will be held at the Beebe House, Put-in-Bay, July 18, 19 and 20. The sessions will open Wednesday afternoon with an address of welcome by Governor Wu McKinley, and the annual address by the President of the Association. A banquet will be served for members of the Association Thursday evening. An interesting program is promised and your presence is earnestly requested. If not already a member of the Association, come and join us.

By order of the Executive Committee.

FREDERICK C. BRYAN,

Secretary O. S. B. A.

VERY GRATIFYING RESULTS.

Our experience with the weekly edition of the LEGAL NEWS throughout the state has been very satisfactory from the beginning and it has already se-

cured a footing very gratifying to us. The value of the publication is not limited to any county, district or circuit and our representative meets, we are pleased to observe, with almost, if not quite, as much success in other parts of the state as he did, in the beginning, nearer home.

The present issue of the LEGAL NEWS is devoted principally to a decision rendered some time ago by the Sixth Judicial Circuit Court, opinion by Haynes, J., which has never been published. Inasmuch as it has recently been affirmed by the Supreme Court, without report, the decision becomes particularly valuable.

U. S. COURTS.

This week practically closes the present term of the U. S. Courts. Judge Ricks will, however, be in Toledo again next week for one or two days to dispose of such matters as may be brought before him.

SUPREME COURT ADJOURNED.

The Supreme Court adjourned on Saturday last until September 24th.

RECENT CASES.

In *Craig vs L. E. & W Ry Co.*, tried in the U. S. Circuit Court, June term, 1894, resulting in a verdict for the plaintiff for \$15,000, the charge of the Court, Ricks, J., places a construction on the statute of Ohio requiring frogs to be blocked or filled, which, so far as our limited knowledge of Ohio decisions goes, gives that subject a new light.

The portion of the charge referred to, following a statement of plaintiff's allegations, is as follows:

"He avers that the frog at the point where the accident happened was not blocked or filled, in accordance with the requirements of the statutes of Ohio, and that because of such failure of the defendant to block or fill the frog his foot caught in the frog and he was unable to extricate it, and was run over.

"The first thing for your determination

is, whether this frog was blocked or filled. The statutes of Ohio make it mandatory upon all railroad companies to fill or block the frogs so as to protect their employes and workmen, and to prevent the feet of the employes from being caught therein. *But the filling of the frogs is not required with sole reference to the safety of the employes, because the defendant is bound to fill or block them with reference to the primary and higher obligations of doing it with regard to the safe operation of its railroad, the primary and higher duty which it owes to the public.* It is not required that the railroad company shall block or fill the frog except as it may be done so as to allow the flanges of the wheels of engines and cars to pass over over it. *Its first duty is to construct and maintain the frogs so that trains may safely pass over them and the lives of passengers not be subjected to unnecessary danger.* Having this primary duty in view, it is then their duty to fill or block the frogs, so far as it may safely be done, to protect the feet of employes from being caught.

"You have had a miniature frog produced here before you, which all agree is a fair representation of a No. 9 standard frog. This is the point (indicating it on the frog shown) which the statute requires the railroad company should fill. As you pass a little further up in the frog you will not find any filling in this (indicating). The statute does require the railroad company to undertake to do that, because that could not be done without endangering the due operation of the road. It appears before you, in evidence, that the flange of the wheel is about three-quarters of an inch deep and there must be sufficient space here to allow that flange to pass safely over these frogs. Then there must be a certain amount of space allowed for the oscillating motion of the engine wheels and car wheels, because if there is not space enough in there to allow that motion it would result in disrupting, disarranging and tearing to pieces the frog. So that it becomes necessary for the safe operation of trains that there should be a cer-

tain space allowed there for the oscillation of the cars. It will therefore be seen that when the statute requires the railroad company to block or fill these frogs, you must bear in mind, it is not solely with reference to the safety of employes. *It is not obliged to block or fill them so as not to allow a man to get his foot in there, if he should willfully undertake to do it, or so he could not do it by accidental means;* but they are required to block them on the basis of the duty they owe to the public and the safe operation of trains, namely, to so fill or block them as to safely allow the passage of engines and cars over them."

The increasing tendency of the times to turn the government into a business corporation is illustrated in a Minnesota statute to provide for the erection and operation of a state elevator for storage of grain. In holding this statute unconstitutional, the Supreme Court of that state, in *Rippe vs Becker*, 22 L. R. A. 857, declares: "It could with equal propriety be claimed that it would be a proper means of exercising the police power of regulating the business for the state itself to construct and operate competing railways. The hack business, the pawn-broker's business, the manufacture and sale of intoxicating liquors, and numerous other kinds of business that might all be named, are also the subject of state regulation; and if counsel's contention is correct, we do not see why, as a means of 'regulating' these kinds of business, the state itself might not engage in running hacks, pawn-brokers' shops building and operating distilleries and breweries, or even running saloons." This case is relied upon as direct authority in the very recent South Carolina case of *McCullough vs Brown*, 23 L. R. A.—, holding that this very attempt of the state to operate saloons under the Dispensary Act of that state is unconstitutional.

The Supreme Court reversed the judgment of the Circuit Court in *The Western Electric Light & Power Co. vs Toledo Electric St Ry Co.* case re-

ported in TOLEDO LEGAL NEWS, vol. 1 page 161 but without report except the following. "Judgment reversed on the authority of the Kinsman Street Railway Co. vs the Broadway & Newburgh St Ry Co., 36 O. S. 239 and Toledo Con St Ry Co. vs Toledo Elec St Ry Co., 50 O. S. 603. Petition dismissed and judgment for plaintiffs in error."

This means that the Robisons or the Toledo Elec St Ry Co. defendants in error, must go into the Probate Court and condemn in order to obtain joint use of the poles of other electric light companies.

The network of electric wires which is rapidly covering the streets of many cities makes questions of liability for dangerous wires very important. In connection with this subject, the recent Wisconsin case of *State, Wisconsin Teleph. Co. vs Janesville St. R. Co.*, 22 L. R. A. 769, is interesting, in which an ordinance requiring guard wires to be placed where they will prevent the contact of telephone wires with wires of an electric railroad company, in case of the breaking of poles or the falling of wires in storms, is enforced against a street railroad company by mandamus.

In *Holtgreive vs Ohio*, error to the docket of a Justice of the Peace, the Court was asked to find that the law of 1890, *Laws of 1890, page 51*, entitled an act to prevent deception in the sale of dairy products and to preserve the public health was unconstitutional.

After an examination of the record and proceedings before the Justice, the Court, by Lemmon, J., found there was no error, thus holding that the law in question is constitutional.

The Circuit Court of Hamilton Co. in the case of *Christian Moerlein Brewing Co. vs Hagerty, Auditor, et al.*, reported in Court Index of June 18th, has held the Rawlings Law, providing for the taxation of raw material and finished product in the hands of manufacturers, to be constitutional.

We observe in Court Index of June 22, a decision by Hollister, J., of the Hamilton Co. Common Pleas Court, to the effect that the holder of a perpetual lease, with privilege of purchase, is an owner within the meaning of the street assessment statutes.

In the same case, *F. T. Clements vs the village of Norwood*, the court follows a well settled principle of law in this district, viz: that boundaries of lots are to be determined for the purpose of assessment by use and occupancy and not by imaginary lines on a plat.

WILL BE ANSWERED LATER.

The belated number of the Law Bulletin containing what purports to be an answer to charges made recently in the LEGAL NEWS came to our notice too late for any attention this week, without disarranging more important matters. We will reply to the weak, and in many respects absurd, defense in our next number.

JURISDICTION.

Exclusive Jurisdiction in the Probate Court for the Determination of Chattel Mortgage Liens and Assignment Matters.

(Hamilton County Common Pleas Court.)

99543—The Graham Lumber Company, limited, and McClaren & Sprague, plaintiffs, vs Bertha Julien, Frank K. Rodman, assignee of the Madison Planing Mill Company, et al, defendants; heard on demurrer. (Four other similar cases) BUCHWALTER, J.

The petition avers that the plaintiffs are general creditors of the Madison Planing Mill Company; that the defendant, Julien, claims a lien upon certain chattel property for \$620; that said chattels are now in the custody and possession of the assignee, Rodman, for the purposes of the assignment according to the insolvent laws of Ohio. Various reasons pertaining to the manner and conditions of the execution of the chattel mortgage to Bertha Julien are set out, wherein it is claimed that said lien is not valid, and should not be allowed by the said assignee as such.

Plaintiffs pray for a finding accordingly; as to said chattel mortgage, that said assignee be restrained from allowing till the termination of the suit, and other relief.

A number of other like actions are filed against various other chattel mortgagees, joined with the assignee, and demurrers have been filed for cause:

1. That this court has no jurisdiction of the subject matter.

2. That other action is pending between the same parties for the same cause, to-wit: the assignment in the Probate court.

3. Misjoinder of parties plaintiff.

4. General demurrer.

With my view of the issue as to jurisdiction, it becomes unnecessary to discuss the other grounds of demurrer.

Their first ground for demurrer calls for consideration of the scope of the jurisdiction acquired by the assignee in accepting the trust, and in qualifying and taking possession of the chattel property in accordance with the statutes regulating such assignments for the benefit of creditors.

It is not averred, and is not claimed, that any special proceeding as to either of these mortgages was taken in the Probate Court, nor is it negatived in the pleading, and the issue, therefore, is confined to the general jurisdiction in such proceedings in the Probate Court.

The allowance or disallowance of a claim is made by the assignee, subject, however, to contest on behalf of creditors, or the assignor; but the determination of the lien and its allowance and payment out of the proceeds is solely upon the order of the Probate Judge—likewise the sale of chattel property upon its order. Has that court exclusive jurisdiction in that regard upon the facts here stated?

Such would seem to be the necessary logic and holding to arrive at the ultimate conclusion in *Lindemann vs Ingham*, 36 O. S., 1, and *Ingham vs Lindemann*, 37 O. S., 218. In 2 C. C., 73, *Simpson et al vs Saylor*, assignee, it was held that the Probate Court had jurisdiction against the protest of the creditors interested, and of the assignee, and the court, in their opinion, held that such court had exclusive jurisdiction, its judgment being subject to appeal, as in other matters of final determination, therein.

A. M. Warner for plaintiffs; B. B. Dale, Oliver B. Jones, Wilby & Wald, attorneys for defendants—Court Index, Cin.

U. S. Circuit Court.

(Northern District. June Term, 1894. Present, Hon. Augustus Ricks.)

McDonald vs City of Toledo. Demurrer to petition.

RICKS, J.
The averments of the petition are that on the 12th of February a severe and violent snow storm prevailed in the city of Toledo which left the snow on or about where Cherry street and Collingwood avenue intersect, drifted to a depth of between four and five feet; that Cherry street is one of the principal streets and thoroughfares of the city; that the street car tracks on that street are double and occupy about 14 feet and that the street is paved 44 feet between curbs; that said snow had been carelessly cleared from the railroad tracks by the defendant St. Ry Co and piled up in conical mounds on the remaining parts of the street to the depth of 4 to 6 feet until it packed and froze so as to become a hard mass rendering said street dangerous; that plaintiff was driving with two horses in a carriage on Collingwood avenue from a northerly direction and turned onto Cherry street and at said crossing of Collingwood avenue it became necessary to pass around a car of the Toledo Consolidated Street Railway which was standing on its track on Cherry street; that while so driving around said car the servants of said Street Railway carelessly started said car and the noise frightened plaintiff's team so that they jumped toward the side of said street and drew plaintiff's buggy upon and over said hardened mass of snow on the westerly side of said street in such a manner as to overturn said buggy; * * * that plaintiff exercised due care in driving and was without fault and but for the existence of said mass of snow piled in said street as aforesaid he could have controlled and stopped his team before said buggy was over turned; that each of said defendants had notice of said piling of snow on said street.

The case of *Chase vs City of Cleveland*, 44 O. S. 505 is relied upon in support of the demurrer. In that case the plaintiff fell on a slippery sidewalk, made so by the natural fall of snow which froze and was beaten smooth and slippery. The street was averred to be a public highway within the corporate limits and it was charged that the City had or might have had notice of the dangerous condition of said walk. The walk was otherwise in good repair. The Supreme Court held the petition insufficient to show negligence.

The reasoning of the Court is that a

fall of snow is a temporary impediment and perhaps a danger which is frequent in northern cities and to impose upon a municipality the duty of removing snow or removing ice from sidewalks would be an onerous burden involving great expense and that unless very exceptional conditions are shown it would not be negligence to fail to remove such impediment or danger from the sidewalks.

It is sought to distinguish the case at bar from the Chase case, first, because this obstruction was in a principal thoroughfare and because it was the result of an unnatural and violent storm and therefore the City had notice of the unusual obstruction to travel that would be caused thereby. It is further insisted that the City had notice that this obstruction was made greater and more dangerous because the Street Railway Company was permitted to scrape the snow from its tracks and pile it upon the streets and that said pile of snow was permitted to remain in the street for seven days and so froze as to become hardened.

But it is to be observed that all these unusual and exceptional conditions which are relied upon to carry notice to the City of the dangerous character of the obstructions in the street may likewise be relied upon to carry notice to plaintiff of the dangers he might naturally expect. For, as the Supreme Court said in the Chase case the City "is bound to exercise only ordinary care, to take such measures as are reasonably to be required and adequate in view of the ordinary exigencies". The conditions set forth in the petition are exceptional and rare. A fall of four feet of snow in one storm is rare even in this section. Is the City bound to remove four feet of snow from even its principal thoroughfares? There are many such in Toledo and they are of great length. The Court may take judicial notice of such facts. It would be a great hardship to impose upon the taxpayers through their City authorities the burden of removing snow and ice resulting from such a storm within so short a period.

The averment in the petition is that the accident was caused because it was "necessary (for the plaintiff) to pass around a car of the Toledo Consolidated Street Railway Company standing on its track on Cherry street". It is not averred that this car had stood there for a long time, or would be compelled to stand there for a long time, so as to show the necessity to drive around it. I think in the absence of such an averment the Court is warranted in assuming that it was a stop to take on or discharge a passenger. I think this assumption ought to be re-

butted by an affirmative allegation which would show some negligence or act tending to establish negligence on the part of such defendant. Because the exceptional storm which left four to five feet of snow on the street would impose upon plaintiff more care and caution in driving about the streets. In such a condition of the street travel might be substantially suspended and persons who persisted trying to drive over such snow banks would be charged with notice and to observe more than ordinary care. In such conditions the driving out of the way to avoid a street car only stopping for a moment would not be "necessary".

For these reasons I do not think the petition states facts necessary to make out a case and the demurrer will therefore be sustained. Hurd, Brumback & Thatcher for Plaintiff. C. F. Watts, City Solicitor for the City.

1217—Repke vs Penn Co. Demurrer to petition sustained, (Plff was stealing a ride and a brakeman pushed him off with a club while the cars were in rapid motion. *Held*, (Ricks, J.,) that the brakeman in pushing plaintiff from the cars in the manner stated was not acting within the scope of his authority as brakeman and that therefore the company was not responsible for his actions.

The Court intimated that if death had been the result of plaintiff's injuries the brakeman would have been guilty of manslaughter.

1144—Schuleburg, admr, vs Dyer. Jdgt vs plff for costs.

Filings.

1182—The Farmers L & T Co. et al vs The Tol A A & N M Ry Co. et al. Application of Receiver for instructions in regard to car trust. A. L. Smith, Solr. for Recr.

1182—Same vs Same. Order fixing Jund 29-94, 10 a m for hearing app. Recr ordered to notify parties in interest and serve upon solicitors of Post. Martin & Co. copy of order.

1222—McDonald et al vs T. S. Galliland. Depositions on behalf of plaintiffs.

1205—Continental Tr Co., et al vs T St L & K C R R. Order concerning F St L

terminal property and concerning contract with Amr Express Co.

1223—T. H. McDonald vs Tol Con St Ry Co. and City of Toledo. Amended petition. Hurd, Brumback & Thatcher, attys.

1222—John J. McDonald et al vs T. S. Galliland. Answer. H. G. Ritchie and Glenn & Wolcott, attys.

1205—The Continental Tr Co. vs T St L & K C R R. Reply of Cassie Alberts to answer of Recr C. H. Kline, atty.

1229—Gawlock vs Mich. Cen R R Co. Motion to remand case to Common Pleas Court, granted.

1205—Continental T Co vs T St L & K C R R Co. Motion of Isaac Vany. Intervenor for trial to jury overruled. Intervenor excepts.

1205—Same vs same. Motion of Intervenor Catharine Rogers admr for trial to jury overruled. Intervenor excepts. Irvin Belford appointed special master to take testimony and report law and facts on Intervenor's petn. Exceptions.

1178—Van Pelt vs Stowe admr. Motion and notice of motion to amend petn filed.

1230—W. H. Kurtz et al vs John W. Long. Demurrer to petn. R. W. Cahill & C. W. Everett, attys.

1230—Same vs Same. Motion for additional security for costs. Same attys.

U. S. District Court.

In Admiralty.

171—Calloway, recr, vs Orient Ins Co. Exceptions to answer overruled. To be reported.

169—Eley et al vs Steamer Shrewsbury. Default set aside. To be reported.

169—Eley vs Shrewsbury. Motion of Buffalo Loan, Trust & Safe Deposit Co. to amend returns of Marshal filed.

175—Conrad vs Barge "Brooklyn." Motion to set aside sale withdrawn. Sale confirmed and bill of sale ordered.

SUPREME COURT PROCEEDINGS.

Causes up to and including No 3075, on the General Docket are called and submitted.

TUESDAY, June 19, 1894

General Docket.

No. 2851. Elger F. Winemiller vs Mary B. Laughlin. Error to the Circuit Court of Paulding county.

BRADBURY, J.

Where in an action brought to foreclose a mortgage, an affidavit in due form to obtain service by publication, is filed and publication had, a finding by the court of common pleas that the publication "is in all respects regular and according to law," and that the defendant has been "duly served with notice of the pendency of said cause of action," is conclusive against such defendant in a collateral attack upon the judgment, even if he had no actual notice of the proceedings, resided within the state and might have been personally served with a summons, and although it does not appear of record that after the publication was made and before the hearing and affidavit was filed stating that the residence of such defendant was "unknown and cannot with reasonable diligence be ascertained," as is prescribed by section 5048, Revised Statutes.

2. The plaintiff in an action to foreclose a mortgage, is not required to set forth either the nature of, or the facts constituting the claim of another lienholder, in order to bar the latter by a decree against his claim if he should fail to answer. If for that purpose anything more is required than to make him a party and serve him with legal process, it will be sufficient for the petition to state that such defendant claims some interest in the mortgaged premises, and advise him that his claim of lien will be barred if he fails to appear and disclose it. Judgt reversed.

2948. R. O. Duncan vs J. W. Willis. Error to the Circuit Court of Fayette county.

SPEAR, J.

W., having knowledge that D. O. D. and R. W. D. were desirous of purchasing thirty to forty heads of hogs, each for separate use, represented to them that he had one hundred head of the kind and quality they wanted; he would not sell in separate lots, but would sell in one lot and the purchasers could divide them to suit themselves. He further represented that his hogs were sound, healthy, and free from disease, and that he had purchased them a few days before at \$5.00 per 100 lbs. In fact, the hogs had been exposed to hog cholera, and were then infected with it, and had been purchased by W. as

diseased hogs, and for a sum much less than \$5.00 per 100 lbs., all which was well known to W., but unknown to the purchasers. Relying on the foregoing representations, the lot of hogs were purchased for \$5.12½ per 100 lbs., the two purchasers each to have fifty head as his separate and individual property, and to feed the same separately on their respective farms. The hogs were so divided immediately upon completion of the purchase. On the same day a number of them owned by D. O. D. died from cholera, and the disease was communicated to his other hogs, some of which also died. *Held*: That D. O. D. might maintain an action for damages against W. for the deceit and fraud without joining R. W. D., or making him a party defendant.

Judgment of the circuit court reversed, and that of the common pleas affirmed.

2767. Wilford D. Johnson et al. vs Henry H. Johnson. Error to the Circuit Court of Cuyahoga county.

BURKET, J.

1. A testator after providing for the payment of his debts, used the following language in his will: "Second - I give and devise unto my beloved wife, and her assigns, all the remainder of my property, both real and personal, however the same may be known, or wheresoever the same may be situate, with full power to bargain, sell, convey, exchange or dispose of the same as she may think proper; but, if at the time of her decease, any of my said property shall remain unconsumed, my will is that the same shall be equally divided between my brothers and sisters, and their children, if deceased, the children to have the same amount the parent would be entitled to if living." *Held*: That under this will the widow took only a life estate in the property, both real and personal, with power to bargain, sell, convey, exchange or dispose of the same as she might think proper for consumption in her life support, and that what remained at the time of her death, unconsumed in supporting her, belongs to the remaindermen designated in the will.

2. That the widow under this will was, by implication, a *quasi trustee* for those in remainder, and the interest of the brothers and sisters of the testator, in the unconsumed property, was a vested right, which could not be destroyed by the act of the widow in disposing of the property by gift to a third party, or otherwise than for her support or the benefit of the estate.

3. A third party acquiring said estate from her by gift or fraud, or by collusion with her, to the injury of the vested rights of those in remainder, and with

knowledge of the will, holds the same, and the fruits thereof, as a trustee for the remaindermen, and liable as such trustee, to account to them in equity.

Judgment reversed.

3439.—Michael Walsh et al vs I. J. Miller et al, trustees. Error to the Circuit Court of Hamilton County.

WILLIAMS, J.

1. While sureties are not liable beyond the plain terms of their engagement, the rules governing the interpretation of their contracts, are not different from those which are applicable in the construction of all written agreements; and it is enough in any written contract that the intention of the party clearly appear though it be not expressed in the most appropriate words.

2. A duly executed bond of an assignee for the benefit of creditors, which recites that, by a certain deed of assignment he was appointed "trustee" for the purposes therein expressed, and is conditioned for the faithful performance by him of all his duties as "such trustee," according to law, bind the sureties for the faithful performance of his duties as assignee, under the deed of assignment.

3. In an action on such a bond for the recovery of the amount found due the successor of the assignee, he having resigned, on the settlement of his accounts, the sureties are concluded by the settlement, and, in the absence of fraud or collusion, cannot question the correctness of the settlement, nor demand a rehearing of the accounts; nor will they be heard to assert that the assets with which the assignee is charged in his accounts, were not the property of the assignor.

4. The sureties on the bond of such an assignee, when he has failed to pay the money in his hand to the successor in the trust, are joint debtors, within the purview of section 3166, of the Revised Statutes; and a compromise with, and release of one surety, will not discharge the others.

5. Such release operates as a payment on the liability, equal to the released surety's proportionate share thereof, but does not prevent the creditor from proceeding against the other sureties for the balance; nor is the released surety a necessary party to such proceeding.

6. The released surety's proportionate share of the liability is determined from the number of sureties, and the amount of the total liability, and not from any agreement between the sureties fixing a different ratio of liability.

7. Whether, in case of insolvency of one of the unreleased sureties, those who are solvent may call on the surety who has been released, for contribution,

Quere? but whether they may or not, the amount to which the creditor is entitled to recover from those not released, is not thereby reduced. Judgt affirmed.

3951—Ohio ex rel vs Charles H. Jones, Auditor of Lucas county. Mandamus. DICKMAN, C. J.

1. An act to amend and supplement sections 2777, 2778, 2779 and 2780 of the Revised Statutes of Ohio, passed April 27, 1893 (90, Ohio Laws, 330) and known as the Nichols law, is not in conflict with section 2 of article 12 of the constitution which provides that: "Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money;" and is a valid law.

2. The act of April 27, 1893, is not in violation of section 16 of Article 1, of the constitution, which provides that: "All courts shall be open, and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law;" nor, in violation of the 14th amendment of the Federal Constitution, which provides that, no "state shall deprive any person of life, liberty or property, without due process of law."

Demurrer to answer sustained, and peremptory writ allowed.

2846—Nora J. Tobias vs Daniel M. Tobias. Error to the Circuit Court of Crawford county.

BY THE COURT.

A failure to obtain leave of court to sue receiver, does not affect the jurisdiction of the court in which the suit is brought to hear and determine it. The requirement is for the protection of the receiver; and, if waived by him, no advantage can be taken of the omission by any one else.

Judgment of the Circuit court reversed, and that of Common Pleas affirmed.

3771—Edward Metz vs John Hagerty, aud'r et al. Error to the Circuit Court of Hamilton county.

BURKET, J.

1. The act entitled "An act to tax the business of trafficking in cigarettes or cigarettes wrappers," passed April 24, and took effect August 1, 1893, 90 Ohio Laws, 235; is not in conflict with the constitution of Ohio, nor with the constitution of the United States.

2. Said act does not authorize the assessment or collection of such tax for the year 1893.

2271—Chauncey H. Andrews et al vs Robert McLaughlin et al, ex'rs. Error to the Circuit Court of Cuyahoga county. Judgment affirmed.

2769—Gertrude Irons by her next friend vs Charles M. Dunlap et al, admsrs. Error to the Circuit Court of Ross county. Judgment affirmed on the authority of *Howard vs Brower*, 37 Ohio St. 402; *Crabill vs Marsh*, 38 Ohio St. 331; *Shahan vs Swann*, 48 Ohio St. 25.

2853—The Dwelling House Ins. Co. vs Edward Avera. Error to the Circuit Court of Sandusky county. Judgment affirmed.

2980—The State of Ohio ex rel, Atty. Genl. vs Seneca County Mutual Ins. Co. Quo warranto. Dismissed by plaintiff.

3083—The State of Ohio vs The Lake Erie Iron Co. Error to the court of Common Pleas of Cuyahoga county. Exception to the ruling of the court, sustaining the demurrer to the indictment, overruled. MINSHALL, J., dissents.

3715—The State of Ohio, ex rel. Atty. Genl. vs The Forest City Building & Loan Co., of Cleveland. Quo Warranto. Judgment of ouster.

3741—State of Ohio ex rel. Atty Genl vs The Wellston Building & Loan Co. Quo warranto. Judgment of ouster.

3819—George W. Martin, admr, vs The P. C. & St. Ry. Co. Error to the Superior court of Cincinnati. Judgt affirmed.

4040—The Western Electric Light & Power Co vs The Toledo Electric Street Ry. Co. Error to the Circuit Court of Lucas county. Judgment reversed on the authority of *The Kinsman St. R. R. Co. vs The Broadway & Newburg St. R. R. Co.*, 36 Ohio St., 239, and *The Toledo Consolidated St. Ry. Co. vs The Toledo Electric St. Ry. Co.* 50 Ohio St. 603. Petition dismissed and judgment for plaintiffs in error.

Motion Docket.

2194—The Pittsburgh & Wheeling Coal Co. vs Gustave Estievenard. Motion by plaintiff to reinstate cause No. 3946, on the General Docket. Motion allowed.

2195—The Toledo Consolidated Street Railway Company vs Thomas Sweeney et al. Motion by defendant to advance cause No. 4053, on the General Docket. Oral argument requested. Motion allowed, and request for oral argument noted.

2196—William Whaley vs The State of Ohio. Motion for leave to file a petition in error to the Circuit Court of Greene County. Motion overruled.

2197—Louis Morehead and John Henderson vs The State of Ohio. Motion for leave to file petition in error to the Court of Common Pleas of Franklin County. Motion overruled.

2198—The Pittsburgh & Lake Erie R. R. Co. vs Julius Munch. Motion by plaintiff to dispense with printing part of record in cause No. 4063, on the General Docket. Motion allowed.

Sixth Judicial Circuit:

STREET RAILWAY FRANCHISES.

(Lucas county Circuit Court, Term 1890. Present Hons. G. R. Haynes, C. S. Benley and C. H. Scribner, J. J.)

Mary E. Simmons vs The City of Toledo et al.

1. The City Council has the power to grant the right to the use of a public street for the purpose of constructing a railroad and when the city grants to an Electric Railway Co. the right to the use of the street for railway purposes the right to erect and use poles for the support of electric wires goes with it. Such use is not a new or additional burden which would entitle the property owners to an injunction or requiring legislative enactment.

2. The use of uninsulated trolley wires in the proximity of telephone wires does not create a danger which would call for interference upon the ground of danger from induction.

3. Before the Council shall grant to a street railway company the right to occupy a portion of a public street the landholders shall be consulted and the Council cannot act until the consent of persons owning lots and lands abutting is obtained, in writing, for the requisite number of feet front required by statute. Section 3439 R. S.

4. Such consents must be in writing and signed by the owner of the property or his duly authorized agent. A signature and consent signed by the husband, in his own name, where the wife owns the property, is insufficient and should not be received or counted.

5. A tenant in common who may desire to vote adversely to his co-tenants has a right to have such vote counted and will be allowed to vote the number of feet front which his undivided interest in the land proportionately represents.

6. The signature of the owner of the remainder in fee, without the signature of the party holding the life estate, is sufficient and should be counted as a proper consent, under certain circumstances.

7. A property owner may withdraw his or her consent at any time before the Council has acted upon it and passed the ordinance.

8. Consent having been given by a property owner and afterwards withdrawn; subsequently the following communication was presented to the Council, "I do not wish to stand in opposition to any enterprise of general good to your city. I think it best to withdraw my name from electric railway remonstrance." HELD, that said communication had the effect of reinstating the consent and that the council was warranted in acting upon it as a consent.

9. A consent given upon the condition that the construction of the railway shall be commenced and completed within a certain time is a condition subsequent and its effect lies as between the party who signed the paper and the party who built the road; so far as the city council is concerned such condition should not preclude that body from acting upon the consent.

10. A property owner may contest the question whether or not the council has the requisite number of consents to give it jurisdiction, but the presumption of law is in favor of the action of the council and the burden of proof lies upon the plaintiff, the property owner, to show that the consent was not given.

11. Where the consent is given by Mrs. A. B. and the abstract shows that A. B. is dead, the burden is upon the plaintiff to prove that Mrs. A. B. is not the lawful heir of A. B. and in the absence of such proof the consent will be allowed to stand.—ED. LEGAL NEWS.)

HAYNES, J. (orally.)

The case of Mary E. Simmons vs

The City of Toledo, et al, comes here upon appeal. The petition for cause of action sets up certain matters in regard to a proposed electric street railroad—that it is the intention of certain of the defendants to build in Huron street—matters which it set up by proper averments, and the fact that Mrs. Simmons is the owner of property upon that street and raises four questions, which are stated in the brief of counsel for plaintiff:

"First: The requisite consent in writing of the owners of the lots and lands abutting upon that part of Huron street over which this road is proposed to be constructed as represented by the feet front, was not obtained or produced to the Common Council.

Second: The application for leave to construct this road was not advertised as required by the general ordinance of the City of Toledo governing this matter.

Third: The City of Toledo has no power to authorize the erection of poles and wires and the building of other structures and appliances for the purpose of transmitting power over naked, uninsulated wires for the purpose of propelling street cars.

Fourth: The construction and operation of the necessary appliances and apparatus, and the use to which the same are put in the operation of an electric street railway materially injures and interferes with the property upon the line of the street and constitutes an additional burden for which compensation must be made before such apparatus and appliances can be constructed."

Counsel for plaintiff have argued their case in the order in which these propositions are stated, and, in delivering the opinion, we will endeavor to follow the same order.

The Statutes of the State to which they refer are, first:

Sec. 3439. No such grant shall be made until there is produced to council, or the commissioners, as the case may be, the written consent of the owners of more than one-half of the feet front of the lots and lands abutting on the street or public way along which it is proposed to construct such railway or extension thereof . . .

Sec. 2502 . . . and no such grant shall be made except to the corporation, individual or individuals, that will agree to carry passengers upon such proposed

railroad at the lowest rates of fare, and that shall have previously obtained the written consent of a majority of the property holders on the line of the proposed street railroad, represented by the feet front of lots abutting on the street along which such road is proposed to be constructed. . . .

And plaintiff states, as a construction of that statute—or, as it is claimed—the manner in which the statute shall be constructed is :

1. "That the consent of the owner is required, not the consent of any other person however wise, learned or influential."

2. "The consent of the owner as represented by the feet front. In other words, the owners act in this matter in proportion to their interest in the real property as measured by its frontage, and not by their number or character in any other respect."

3. "This consent must be in writing. No oral consents however formal, can take the place of the plain statutory requirement that these consents must be in writing."

4. "These consents must be obtained and produced to the Common Council as a condition precedent to the power of the Council to act."

Now, in regard to these propositions, I will state generally the conclusions to which we have arrived.

As to this first proposition: "The consent of the owner is required, not the consent of any other person however wise, learned or influential." We agree, in the main, with the statement that is made by counsel in that respect. Where we may differ from him before we get through, is, upon the evidence of the consent. We agree that the statute contemplates that it is the owners of the lands themselves whose consent is to be given, whose opinion is asked for and required, under the statute, by the common council.

2. "The consent of the owner

as represented by the feet front. In other words, the owners act in this matter in proportion to their interest in the real property as measured by its frontage, and not by their number or character in any other respect."

To that we agree, with the exception, perhaps that the last clause might have reference to tenants in common of the property, and in respect to that I will speak hereafter.

3. "This consent must be in writing. No oral consents, however formal, can take the place of the plain statutory requirement that these consents must be in writing."

That the consents must be in writing, there is no question, because the statute requires that "no oral consents, however formal, should be taken;" that is substantially true, and by that I mean that the statute does not contemplate or authorize the council to receive the consent of an owner, even though he should be present stating his consent orally; it contemplates that they shall be written consents, placed on file and shall be a matter open to the examination of all parties who are interested in the matter.

4. "These consents must be obtained and produced to the common council as a condition precedent to the power of the council to act."

I think on that question there is no dispute—if I understand it properly.

The next question that plaintiff makes is in regard to the ownership.

"The words 'owners and holders' as used in the two sections are obviously synonymous terms. Precisely as we would use the words 'owners of stock' and 'stockholders,' to convey the same idea, so here these two parts of the same statute use these two words to convey the same idea; and in one section of the statutes of Ohio the two words are

used interchangeably." I do not think there is anything that arises, under the view of the facts of the case as we finally find them to be, which would require any extended definition in regard to this matter. They treat and speak of the owners of property. There was a question that did arise, I believe, in one case, in regard to the rights of a tenant for life, but I think, under the decision that we make, it will be unnecessary to discuss that, and in regard to that, I will speak as I pass over the names.

The material and main thing, and perhaps one of the most difficult questions of the case, is this claim made on behalf of plaintiff: "That the consent must be in writing. Upon this question the statute is certainly clear, express and explicit, and until this case, it has never been questioned. In every discussion arising under such statute it has always been assumed that the consent for whatever purpose it is desired, must be in writing, and it would certainly be a remarkable state of affairs if the power of the council to act in these important matters should depend upon parol proof as to what happened on street corners, or that the signature of A. should be converted, by parol proof, into the written signature of B."

There are different classes of cases upon which this arises. Some of these consents are consents by the owners of the property. Some are consents in the names of the owners of the property by persons purporting to be acting as their agents. In other cases they are signed by the husband, the wife being the owner of the property; and the parties have put in parol proof showing that the wife gave her consent to the signature and it is required of the court to count the name of the husband as really the name of the wife, or, at least, to count it as a legitimate consent

under the statute, of the property owner, to the work. It is said in that connection that the consent is a vote, and that the signature, as we understand the argument of counsel, that is attached to those consents, should be signed by the owner himself or herself; in other words, that it should be the personal matter of the party who gives the consent and that the only evidence that could be before the council would be that the signature which was attached to the consent should be in the hand-writing of the person who gives the consent. That matter is discussed and some citations are given upon the question.

At first blush it would seem, and at least it may be very properly and very strongly claimed, that when the statute requires that the consent shall be in writing, that it means that it should be and that they should have the written evidence of the party who owns the land—the highest and best evidence—the real evidence in the case, so far as the writing is concerned, would be the signature of the party himself. On that point counsel based a very strong argument in favor of their proposition that all consents should be excluded except those signed by the owners of the property. We are unable to concur with counsel in that respect. We agree with them that the consent should be signed by the owner of the property, but the manner in which that should be evidenced and the method of evidencing it—even of that written document—is one upon which we have come to a rather different conclusion than the one suggested by counsel for plaintiff. Reference is made to the Statute of Frauds and an analogy is sought to be drawn from that. The Statute of Frauds provides that when any grant is made of real estate or an interest in it, that it shall be signed

by the party who is to be charged or by his agent thereunto lawfully authorized. And, in regard to land contracts, it provides that the papers shall be signed by the party to be charged or by his agent thereunto lawfully authorized; and in one case, it is held, rightfully, that the authority of the agent must be given in writing. The consent itself may be by power of attorney, under the statute and when it conveys an interest in land it is necessary not only that the authority should be in writing, but that it should be acknowledged. In regard to contracts, it is agreed on all hands that no written authority is necessary in or to give the agent authority to sign the name of his principal to a paper. The ordinary commercial rule is that a person may do by the hand of another that which he may do for himself. It is said, however, that that rule should not be applied in this case; that it is not intended to be so applied. That, while that is true as to commercial law, it is not true in a just and fair construction of this statute. We think it must be admitted, however—if a man, being unable to write his name, should, in the presence of a person who should write his name, direct him to write that name, request him to write it—it would be held by law to be his act—be held to be his written document. Indeed it is quite common in commercial transactions, that a person should make his mark, which is done by simply taking hold of the pen; and so it is to be supposed if a man couldn't write. In the signing of this paper if he should request a party to write his name and the person touched his hand to the pen in making the cross, it would be his signature, and we think it is also if he should request a party standing by to sign his name, that that would be his signature.

We have had cited to us the case of *Rapp vs R. R.* decided by Judge Longworth in the Superior Court of Cincinnati and citing a New York case. We have read that case with a great deal of care and attention and interest in his reasoning. He refers to the Statute of Frauds, but refers to the statutes under which he was then deciding the case that he did decide. That is a little different suit from this; but it is stated that the consents are required to be in writing, and he argued from the Statute of Frauds that if the legislature in that particular act had sought or decided to change the law of the Statute of Frauds or if they had desired to state that the party might sign his own name or to have signed his name by an agent, that they would so have stated in the statute itself. It seems to us that the very reverse is the conclusion to be drawn. In regard to the Statute of Frauds, the legislature were particular to say that the party who was to be charged must sign the paper himself—"Signed by the party whose name is to be charged" is the language. If they had desired that the consents in writing should be signed by the individual who owned the land, it would have been easy for them to have said that the consents should be in writing and be signed by the party who owned the land. We see nothing in the construction of the statute itself, we see nothing in the nature of the business that is being done—the obtaining of the consents—that should require a strict construction of this statute. No grant is made of any interest in the land itself—I believe we all agree about that—it is only in a matter of so much importance as a street railroad along a public street, one that affects the interests of the property owners, or affects their taste at any rate, and the law provides that before the

council shall be permitted to grant that right of the public in the street to a railroad company, the landholders shall be consulted and that they should give their consent; and it is provided and held perhaps, that the council should not act and cannot act until those signatures or consents are obtained and that those consents give jurisdiction to the acts of the council. But the thing that they are seeking to get all the time is the consent of the owner and to know that he is willing that the railroad company shall pass with their road. It requires that that should be made in writing, or at least be made a matter of record, to file in the office of the city council, so as to be open to the inspection of the public, and so as to be definite and certain as to the respective rights of the parties: Suppose now that the paper is signed and presented to the the council with the consents and the person making the application to the council says: "We have obtained the consent of the requisite number of the property owners upon the street and we ask the council to pass the ordinance," and he lays the paper down. The council look at the paper and say: "We don't know the signatures upon that paper; how do we know who are the property owners?" He then presents his abstract of title and furnishes evidence that the party has signed—that the signature purporting to be his true and genuine signature is such. In that instance the corporation has to go by parol evidence; it is the very first step of showing that he has consented and when it is shown that that is his signature then of course it is his consent in writing evidenced by the best of evidence, to-wit, his own signature.

Suppose we come to the next thing and say that this purports to be signed by the land owner by A. B. his agent. How do we know

that that is his agent? Two things are to be proved; one is that A. B. is his agent and authorized to sign that for him; and, secondly, that he has signed it by himself. They then have the consent of the owner and have it in writing; have it supported, as in the first instance, by parol evidence, but is not that still the written evidence of consent of the party? If a man presents a paper in court, if it is shown that he signed that paper by his duly authorized agent, is not that, in law, HIS contract in writing?

We see no reason why we should not hold that when the contract is signed in the name of the principal by the agent thereunto duly authorized by the owner of the property for that business, that the council have before them the written evidence of the consent of the owner—his written consent in law. Following that, we have, as a general rule, I will say, taken the names that purport to be signed by the agent—either signed in the form "A. B. by C. D., his agent," or "C. D. by A. B." and where evidence has been given that the owner of the land had authorized the party to sign his name for the street railroad, we have allowed that signature to stand and be counted as a signature for the road.

We have then the fact where the owner's attention has been called to the road; we have the fact where the owner has decided in favor of the road passing through Huron street; we have the authority of the agent and we have the signature of the agent presented to the council and acted upon by the council.

Now in regard to those claims about which there is contention; that is, where the signature has been made in the name of a party who does not purport to sign for the principal—say in the name of the husband. We have as a general rule, excluded those, because

nowhere does it purport to be the signature or written consent of the owner of the property, and, turn it whichever way you will, prove it by whatever way you may bring it in, you still have simply oral evidence that the party has given his consent and nowhere would the fact be raised, in fact or in law of his or her written consent to the railroad being built.

In regard to the owners of the property, there is a considerable class of cases to which objection was made—where they were tenants in common. It seems to us that as a matter of right, a person who is a tenant in common would have a right, if he votes in favor of the railroad, to have that vote counted. He is the owner of a certain definite interest in the property. You take the case of Judge Lemon, who owns, in conjunction with two other parties a lot of land on Huron street. He owns an undivided one-third of every foot of that property, and as much upon the street front as upon the back. It may be said that he might be awarded his property at the rear end of the lot; but, also, he might be awarded the property at the front end; the real fact is that he has a definite interest in the property—a one-third interest in the property. Every person who does not sign that paper or vote for it, is counted against it. He is anxious to have the road built. You say to him that because other parties don't vote for it, his vote shall not be counted and he is practically disfranchised and excluded from his interest in the property. We think as a matter of law and right his opinion should be counted and we think the Supreme Court, in 35 O. S., page 455, has precisely decided that it may.

There are some other matters in connection with this that may be

raised as I go through the list of names. There is a matter in connection with questions argued by counsel and that is—where the burden of proof lies in regard to these matters.

It seems to us—and we have been very clear upon that all the way through—the Supreme Court say that the property owner may contest the question whether or not the council has the requisite number of consents to give the council a right to pass upon it—we think the burden of proof in a case of this kind lies upon the plaintiff to show that the consent was not given; that is to say, the presumption of law is in favor of the action of the city council, that is the general rule of law. It is the rule of law, in our judgment, applicable to this case. When a name is reached upon the list the council pass upon it. What evidence is given by the plaintiff to show that this party did not give his consent?

A good deal of testimony has been offered where the question has been about whether they gave their consent in writing. The question was properly put, because counsel wished to raise a certain question and we think that was the proper way to raise it. They pursue their case upon the theory that the consent must be in writing and seemed to be willing to abide by the proposition of law in this respect, but in following out the inquiry upon these names we have gone upon the assumption that the law is that the burden of proof is upon the plaintiff to show that the signature of the party attacked is not the signature of the party that it purports to be. We have read the abstract over and there is a large number of cases where the signature does not purport to be the signature either made by the owner himself or by his agent. In that class of cases, it

is sufficient to show that the party did not own the land.

Touching this first question. The abstract that was furnished by counsel for plaintiff shows, first, that there is, by the agreement of the parties a consent of 3,176.83 1/8 feet that is undisputed. The agreed statement is that the whole frontage upon the street is 10,605 feet (and a fraction, I think). Taking the 3,176 feet as admitted as a standard, we come first upon the statement of persons who have remonstrated and practically had taken their names off prior to the 18th day of March. We have stood by the 18th of March and have examined all these names and gone over them.

It is objected that parties had not the right to take their names from the paper after they had once signed. We think, under the decision of the Supreme Court, that that is a matter of right—that a party would have a right to withdraw his name before the council had acted upon the paper and passed the ordinance. The date is fixed before it was passed by the first one, and we will allow it to stand at that point.

Now coming to the list of names that the counsel on behalf of plaintiff object to being counted. We have gone over these names, one member of the Court taking the abstract and the other following the evidence, with such notations as appear, and taken them up one by one.

The first signature is that of George Willard. In this case Willard signed the paper—a consent. He afterwards withdrew that consent; and afterwards a paper was submitted to the council, it is said, in these words: "Ironton, O., March 25th, 1889. I do not wish to stand in opposition to any enterprise of general good to your city. I think it best to withdraw my name

from from Electric Ry. remonstrance. George Willard." The council acted upon the name of George Willard—have acted upon the paper before them and they have counted his name. It was one of the names as in favor of the road. We think, under the rule we have laid down, the burden of proof is upon the plaintiff to show that Mr. Willard did not give the consent; that he did not sign the telegram, if you please, that was sent and upon which they acted. We think counsel for defendants might well have omitted any testimony whatever of the character that they did attempt to offer through Mr. Clark, in support of the telegram. We have therefore allowed the name to stand. So far as the objections to the testimony of Mr. Clarke are concerned these objections may be sustained, so far at least as the telegram is concerned.

There is another thing in regard to that (and that pertains to quite a number of the signatures) which I will dispose of as I pass. The consent was given upon this condition: "Work to be commenced upon said railway, completed and in full operation within one year from the above date; or to become void and of no effect." We think those conditions are in the nature of conditions subsequent and that their effect lies as between the party who signed the paper and the party who builds the road. If the party building the road does not comply and conform to those provisions, the party who has given the consent with those conditions, if he has any claim or right against him in regard to the matter which he can enforce, he has a right to enforce it as between himself and the parties building the road, but so far as the city council is concerned we think that should not preclude the city council from acting upon it as a consent that the road should be built and

count it as one of the consents, and hence, in regard to these names which are signed under such conditions we have held them as a general thing, to be counted.

MR. PRATT.

The 18th of March his remonstrance withdrew that consent and the telegram is dated the 25th of March. The first body had no jurisdiction.

THE COURT.

We have discussed that matter; that was filed before the ordinance was finally passed.

MR. PRATT.

It passed the first board on the 18th; this telegram was on the 25th and it was finally passed on the 27th; but at the time the first body passed it it didn't have his vote in favor of it.

THE COURT.

That is so, but at the time of the passage of the final ordinance, before the final body, it was before the council. We took the remonstrance as of March 18th. In regard to the effect of the consents and their effect upon the validity of the ordinance itself, we have treated the ordinance the same as we would the passage of a law by the General Assembly—as taking effect and to be considered as of the date when it passes the last body, which first gives it validity; and in discussing this question we counted it because the telegram was received and acted upon by the council before it was finally passed, and the effect of that was to withdraw the remonstrance and leave the original consent as a consent subsequent before the council.

In the case of the signature of John C. Carland, ownership, Rose Carland, lot 39, Johnson's addition, 34.50 feet, that is signed in the of John C. Carland; the ownership being in Rose Carland, that, under the rule which I have stated, is not received—that was rejected.

The signature of William Bell (No. 3 on this paper "memorandum of Evidence upon the question of consents") William Bell, for wife. Ownership, Hannah M. Bell, 53.93 feet. Hannah M. Bell saw her husband, William Bell, write on this consent; she didn't know what he wrote; gave him no instructions or directions to write her name. She identifies the name 'Wm. Bell' as the handwriting of her husband, but does not recognize the words 'for wife,' and they are obviously in a different handwriting from that of the signature 'Wm. Bell.' Mrs. Bell told her husband with reference to this matter 'Do as you please.' The signature is the signature of William Bell and was signed in the presence of Hannah Bell and he was consenting and she was consenting also, to the building of the road, and for that reason, upon examination of the testimony of Hannah M. Bell herself, we have allowed that to stand as a consent in favor.

The signature of R. Law (No. 4) the ownership was in Elvira Law. "Robert Law had told his wife that he was going to sign for the electric street railroad; he had never told her that he was going to sign her name or for her. She is rather inclined to think that she don't know whether she wants the road or not. His wife had never told him whether she should sign or not." This is the testimony of Law, and is correctly stated in substance. That we reject. The consent of Mrs. Law was never had, clearly stated.

The signature of F. B. Dodge. The ownership was in Caroline P. Dodge as to 84 feet. That is the signature of F. B. Dodge and of himself alone. She raised no objection but there is nothing to show, no evidence that she ever in any manner or form authorized him to sign for the 84 feet, and as he is the

owner of a large amount of property on the street, it does not appear with sufficient distinctness that she understood that he had signed for her property: And again, he does not sign in her name, or as her agent, and we therefore reject the 8th feet.

No. 6 is the signature of John Schminck. The ownership was in his wife, Benadena Schminck. "After Schminck had signed his own name to the consent, he told his wife that he had done so. She never objected to his signing his own name to the petition." The testimony here is substantially the same as in the case of F. B. Dodge, and that is rejected. The signature is simply John Schminck.

No. 7 is the signature of Mrs. A. Susor. The ownership was in Joseph Schindler, Trustee. "Prior to Feb. 7th, Mrs. Anna Susor was the owner of the property. In her absence and without her authority Elias Susor signed her name to the consent. Feb. 7th, the property was conveyed to Joseph Schindler in trust for Elias Susor. No further attempt to give consent was made." The testimony shows that Mr. Brumback was present at the time that signature was obtained. The signature was made by Elias Susor. He first signed it "E. Susor," and the question being raised whether the title of the property was in himself or his wife, the signature was changed to "Mrs. E. Susor." The property was afterwards conveyed by her to Joseph Schindler in trust for Elias Susor so that he himself had a beneficial interest in the property before the consents were passed upon by the council, and never made any objection. We think, under the peculiar circumstances of these facts, he having a beneficial interest, he signed his own name and then attempted to sign hers—that the evidence of his consent was fairly before the coun-

cil and we have therefore allowed this to be counted.

No. 8 is the signature of William Doty for Allie Doty. The ownership was in Alzorah Doty, his wife. She authorized him to sign and that is allowed.

No. 9 is the signature of H. Hood for M. C. Hood. The ownership was in Mary C. Hood. They had talked the matter over and agreed that the consent should be given. That is therefore allowed.

No. 10 is the signature of F. B. Shoemaker. C. H. Royce by F. B. Shoemaker. The ownership was in Mrs. Alice C. Royce. The signature is rejected as a consent.

No. 12 is the signature of Chas. P. Barnum. The ownership was in Adaline L. Barnum. This was signed at the court house. There had been a general conversation between him and his wife, but there was no sufficient authority given him by his wife to sign and this was a signature the council had no right to pass upon; and therefore we reject it.

The 12th signature is Mrs. Nicholas Hayes. The memorandum is "There is no evidence that Mrs. Nicholas Hayes had any interest in the property." The property, it seems had belonged to Nicholas Hayes. The abstract shows that he was dead. There is no evidence to show on the part of the plaintiff but what Mrs. Hayes was the legal and lawful heir of Nicholas Hayes, as she might very well be, under the statute, or under a will, and in a case of that kind, where the council passed upon it, we think the burden of proof is upon the plaintiff to show that Mrs. Hayes did not possess the qualifications to consent and we therefore have allowed it.

No. 13 is the signature of A. M. White, by D. Coghlin, agent. In that case we allow it. We think the evidence shows that Mr. Cogh-

lin had sufficient authority to sign. In that case the judgment was left in Mr. Coghlin. We are of opinion that where the matter of the building of this road was brought before the owner of the land, he having an agent upon the ground and says to him "I have been requested to sign a consent upon that railroad: I send you the letter and request you to act for me and use your best judgment in the matter." We think that that judgment should bind the principal, and therefore we have allowed the signature.

The next is No. 14, the signature of Charles Butler by R. & E. T. Waite. We have allowed that to be counted. We think that should be counted; they were authorized in writing and exercised their agency.

Alvah S. Hobart, per letter. The ownership is in him. We have allowed that.

No. 16: C. M. Bellman is the next signature. The ownership is in Charlotte M. Bellman. We think the testimony sufficiently shows that he had authority. That purports to be the signature of the owner of the land. The council passed upon it. There was some testimony that one of the persons who got the signature went to the house to see her and that she said he might sign and he went to the telephone and called up somebody, and then signed it. The council having passed upon the consent, we think the burden of proof is on the other side to show that she did not sign.

No. 17. D. Lovett by D. L. In this case we think the authority given was sufficient; she told her husband that he might sign the consent. A fortunate thing about that was—that her name was Delia and his name was Daniel; and you may turn it whichever end you will and it comes out all right! I don't know whether it is intended

to be Daniel Lovett by Delia Lovett, or Delia Lovett by Daniel Lovett; but that is for the plaintiff to establish.

No. 18 is the signature of "Mary C. Millard per I. I. Millard" and is counted.

Samuel S. Southard per E. E. Southard. (No. 19). In this case Samuel Southard told his son he might sign for him if he thought it was best, and he exercised his judgment and signed it and it was counted.

The next (No. 20) is Mary Jane Pixley by C. H. Pixley. That we count on the testimony of Charles Pixley.

No. 21. Jane Dooley by F. W. Rickenbaugh, Agent. That we reject for want of sufficient authority; it appearing that all the evidence is before us in the case.

Mary R. Bullock per B. E. B. Atty. (No. 22). In that case we allow it; there being evidence that her husband was authorized to sign for her.

The next signature is No. 23. Connecticut Mutual Life Insurance Company by W. Baker. That we have rejected, on the ground that Mr. Baker does not show sufficient authority for that particular purpose, although he has very large authority from the Connecticut Mutual.

No. 24. F. D. Barnes by T. B. Lee, Agent. We reject that also, as not having sufficient authority, all the evidence being before us.

No. 25. The signature of Mrs. C. M. Hayden per C. M. H. We admit that on the testimony of Mr. Hayden as having sufficient authority.

No. 26. E. M. Coghlin is the next signature. We admit that for the same reason.

No. 27. Mary E. Lee by Ira E. Lee. We admit that for the same reason.

We allow the signature of Almira

Pixley, upon the testimony of Mr. Pixley.

No. 29. H. E. Schenck by S. C. Schenck. That is also allowed.

No. 30. Fanny L. Forbes by O. A. Forbes. It appears in this case that the wife never fairly consented; she don't know whether she did or not. We reject that because it is not clear that she consented.

F. W. Bainbridge, E. A. Bainbridge authorized by F. W. B.—that we allow upon the testimony of F. W. Bainbridge.

No. 32. D. Sullivan by L. S. Sullivan. This property seems to have belonged originally to D. Sullivan. It was in the possession of L. S. Sullivan. I think he says he signed four times, in some form or other; he was determined that the city council should know that he was consenting to the construction of this road. He signed one signature on the 15th of March and another on the 23rd. We have counted him as consenting.

No. 33. Doan Blinn for E. Louise Blinn. We reject this upon the testimony of Mr. Blinn; there does not seem to be any definite knowledge as to whether his wife consented.

No. 34. William Rawle—West Estate. This we reject. There is no evidence that Mr. Rawle had authority to sign for the West estate. The ownership seems to have been in Clara G. Kelley, Lewis F. West and Frank E. West and he don't profess to sign their names in the signatures of the owners of the property, which are not placed in the petition at all. We reject that for the reasons we have already stated.

No. 35. William Rawle, Agent P. Laughlin. That purports to have been signed by Rawle as agent for Patrick Laughlin; it was passed upon by the council, and, under the rules we have already

stated, that should be counted, unless it is shown by the other side that Rawle had no authority to sign.

No. 36. J. M. Ashley per C. S. Ashley. That we allow upon the testimony of the party. These parties were all in existence and about, and we think that the council having passed upon that signature, the burden of proof is upon the plaintiff to show that Mr. Ashley had no authority. These witnesses were all around here and their testimony could have been taken.

No. 37. John McBride by Wm. Bruns. That we allow, for the reason that there is no testimony tending to show that Bruns had no authority. The signature purports to be the signature of the owner per Bruns.

No. 38. R. M. Streeter per W. M. Bellman. This we reject because all the evidence seems to have been before us, and shows that Bellman had no authority to sign.

Mrs. A. Brigham by Ira A. Richardson & Son, agents. In this case, Mr. Brigham lived in California. The property had been left in charge of Ira A. Richardson & Son. Mr. Richardson wrote to him. The whole business had been conducted with W. O. Brigham, the husband. The title was in Mrs. A. E. Brigham. The letter went forward and was returned with instructions to consent, and that instruction was given by W. O. Brigham, the language being that he might sign his name. It was understood to be authority to sign Mrs. Brigham's name by Richardson & Son. We think that ought to be counted. The council have passed upon it and we think the burden of proof was upon the plaintiff to show that Mrs. Brigham did not give her consent. The pre-

sumption might fairly be that she did understand it.

The next signature is William Dugdale, C. R. M. Agt. That we allow on the testimony of C. R. Messinger and upon the authority shown. So far as Mr. Perkins is concerned the presumption would be in favor of the signature being correct. We think there was fair evidence that there was authority to sign and we count it.

No. 41. E. L. Abell by one of the heirs. "Ownership, last deed to Eliza Abell." The evidence is that the other heirs had authorized Mrs. Towers, who was one of the heirs—formerly being Harriet E. Abell—to sign the names and that the signature was made in this form; we count that as being the requisite consent of the owners.

John and Alice Buckingham per Jno. Berdan, Agt. Mr. Berdan was authorized to sign for the Buckinghams, if he thought best, John writing him and saying that he directed the matter both for himself and at the request of the sister. She had become married and her name was Alice P. Murphy. The title at the time of the ordinance was passed being perhaps in John M. Buckingham and Alice P. Murphey, but she having received by her heirship we are of opinion that that ought to be counted as the proper consent of the real owner of the property.

No. 43. Emery Bros. by Gleason & Manning, Agts. That we allow upon the testimony of Mr. Manning, as having sufficient authority to make the signatures.

MR. SMITH:

Does the Court understand that the Emery consent signature was withdrawn, by the same agent, and there is no proof that the third signature was made either by Gleason or Manning, or either of the Emerys, and they had no agents here?

MR. BRUMBACK.

The same agents signed both times.

THE COURT:

I think we came to the conclusion that from the testimony of Manning, there was sufficient evidence to show that that might have been Mr. Gleason's hand writing.

MR. PRATT:

The proof was that it was not. He also testified that he knew both of the Emery Brothers and that it was not their signature.

THE COURT:

I will mark that and pass it. We had quite a long discussion on that and our final conclusion was to allow it.

No. 44. T. B. Hine. Mr. Hine bought the property and put it in the name of himself and wife. He never asked her if he could put his property in her name, or whether he might sign for the railroad. The property, however, stands an undivided half in the name of Lovinia R. Hine and there is no evidence that she ever gave her consent. We count one half of that property.

No. 45. M. J. Cooney & Co.; ownership, Michael J. Cooney and James Reid. This property was testified by Mr. Cooney to be held two-thirds in his name and the other one-third in Mr. Reid; that it was owned and held and used for partnership purposes and he gave his consent and supposed at the time that he had authority to give his consent in regard to it as partnership property. We are inclined to the opinion that that view is correct and that it ought to be counted the same as a partnership consent and as a consent for the whole property and we have so counted it.

No. 46 is the signature of R. C. Lemmon who with two others owned a lot. We count one third of that property for the road, being

18.66 feet, the whole lot being 146 feet.

Signature 47, D. W. Miller, this is owned by Daniel W. Miller and his wife. We count one-half of that; there is no evidence to show that Fredericka Miller, the wife, consented.

No. 48. F. B. Dodge. Under the testimony that has been offered—Mr. Witker at the time he bought that property knew of Mr. Dodge's signature to the consent and never withdrew it, we think that is sufficient.

No. 49. Fred Eaton. That stands upon the same ground as in the other case, that is the case immediately preceding, and we count that in favor of the road.

No. 50. Henry Scharf Executor of Nicholas Scharf. There was a life estate in Mrs. Scharf, an old lady, some eighty years old. Henry Scharf had the remainder. He lived upon the property and took care of his mother, who was old and feeble and he signed for the property. We think, under the circumstances, that he ought to be counted in favor of the road. He was in possession of the property, had charge of the property, was the owner of the remainder, the fee was vested in him subject to the life estate of his mother, and we think under those circumstances, he giving his signature, that the property ought to be counted as the signature of the owner of the property.

No. 51. Locke and Lane; Trustees. Lot 1050 Vistula, 100 feet. "The trustees have by the will the control and management of the property so far as is necessary to preserve it for the term of ten years after the death of David R. Locke." The power of attorney gives these trustees very full authority over this property, and under that power, we think they had authority to do many things, and we think fairly had authority to sign

this signature, and that the authority would extend beyond the period of ten years, the same as the exercise of any other power that was properly exercised under it that would pertain to the land, and we therefore have counted this signature in favor of the road.

No. 52. Joseph Keip. This we reject, for the reason that we do not see any sufficient authority.

No. 53. John C. Darst and L. K. Parks. This we allow, upon the authority of Mr. Parks.

No. 54. Mrs. Lillian W. Pope. This we allow on the testimony of Mr. Pope, that his wife had given him authority.

No. 55. E. M. Kean. Ownership, Edward M. Kean. "This signature was made by Thomas Kean without any authority from Edward M. Kean. Mr. Thomas Kean had collected the rent and paid the taxes on the property for some years. Mr. Edward M. Kean was not informed that his name was signed to any consent." We think that should be rejected.

That, I believe, covers all the signatures *that are contested*. Our footings of the amounts attached to these signatures proper to be counted make the whole amount 5610.31 ft. One-half the street frontage is 5302.50 ft. Which gives a majority in favor of the consents of 307.81 ft., according to our figuring. We therefore hold, on the facts of the case, that at the time the council passed this ordinance, they had jurisdiction to act upon the question.

The second point that was made was that "The general ordinances of Toledo were disregarded in advertising the application of David Robinson, Jr. Trustee."

This, we understand, was passed upon in the other case. We have not gone over it but abide by the decision we made at that time

and hold that the advertisement was sufficient.

The third point is, that "the Common Council exceeded its power." It is said that the Common Council had no power to grant this franchise; that it was a new and additional burden upon the street, a new and additional use of the street not contemplated in the original use of the street, as we understand it, and, unless express power can be shown to have been granted by the legislature; the city council had no power to grant the franchise.

That the city council have the power to grant to the use of the public upon the streets—to a corporation—to build therein or to use the street for the purpose of constructing a railroad, there is no question, under the decisions of the Supreme Court of Ohio, as it has been tested. Really, in our judgment, the only point in the case is this; that the using of it for the placing of poles in the street to support the electric wires becomes a new and additional burden and not one contemplated, and therefore should be given by grant of legislature in the first instance. We are of opinion on that, as has been stated in a decision that I have before me, that the use of poles for the support of electric wires for the purpose of propelling cars upon this road, is not a new or additional burden; it is only incident to the use of the road for the purpose of street cars to be propelled by electricity, and that in that view of the case, when the city grants to an electric railroad the right to the use of the street for railway purposes, that the right goes with it to use and erect these poles.

In connection with that comes the question of this new and additional burden. I desire to read from this authority, because it seems to state it so well. I will read from *The Atlantic Reporter*,

Vol. 19, page 326. Taggart et al vs Newport Street Ry. Co.:

The fourth ground alleged is that if the act of incorporation authorizes the use of electricity for the operation of said street railway, and the erection of the poles as ancillary thereto, it is unconstitutional and void because it authorizes the imposition of an additional servitude upon the streets, without providing for any additional compensation to the owners of the fee of said streets. We think it is settled by the greater weight of decisions that a railroad constructed in a street or highway, and operated by steam, in the usual manner, imposes new servitude, and entitles the owner of the fee to an additional compensation, but that a street railway operated by horse power, as such street railways are ordinarily operated, does not impose any new servitude, and does not entitle the owner of the fee to any additional compensation. (Citing cases.) The distinction is often stated as a distinction between steam and horse railroads, but the distinction properly rests not on any difference in motive power, but in the different effects produced by them, respectively, on the highways or streets which they occupy. A steam railroad is held to impose a new servitude, not because it is operated by steam, but because it is so operated as to be incompatible with the use of the street, or in other words, so as practically to exclude the usual modes of use. A steam railroad on a street, so operated as to be consistent with the use of the street in the usual modes, has been held not to impose a new servitude. (Citing cases.) It is not the motor, but the kind of occupation, whether practically exclusive or not, which is the criterion. (Citing cases.) A steam railroad, as ordinarily operated, it has been said, comes into serious conflict with the usual modes of travel, and is a perpetual embarrassment to them, in greater or less degree, according as the business of the railroad is greater or less, or as the running of the trains is more or less frequent; whereas, the ordinary street railway, instead of adding a new servitude to the street, operates in furtherance of its original uses, and, instead of being an embarrassment, relieves the pressure of local business and local travel. (Citing cases.) The only considerable privilege which the horse car has over other vehicles is that, being confined to its tracks, it cannot turn aside for other vehicles, while they are forced to turn aside for it; but this is an incidental matter, insufficient to make the horse railroad a new servitude.

The street railway here complained of is operated neither by steam nor horse power, but by electricity. It does not appear, however, that it occupies the streets or highways any more exclusively than if it were operated by horse power. The answer avers that "electricity, besides being safe and as easily managed as horse power for the propulsion of street cars, is more quiet, more cleanly, and more convenient than horses, both for residents on the streets used by said cars, and for the public generally, and also causes much less wear and injury to the streets and highways than is occasioned by street cars of which horses are the motive power." These averments, the case being heard on bill and answer, must be taken as true. We see no reason to doubt their truth. It is urged that electricity is a very dangerous force, and that the court will take judicial notice of its dangerousness. The court will take judicial notice that electricity, developed to some high degree of intensity, is exceedingly dangerous, and even fatally so, to men or animals, when it is brought in contact with them; but the court has no judicial knowledge that, as used by the defendant company, it is dangerous. The answer denies that it is dangerous to either life or property. It is also argued that the cars, moving apparently without the application of external force, alarm and frighten horses. This, so far as it is alleged in the bill, is denied in the answer. We see no reason to suppose that this form of danger is so

great that on account of it the railway should be regarded as an additional servitude. The answer alleges that a great many street railways operated by electricity, in the same manner as the railway of the defendant is operated, are used in various towns and cities in different states, and that many others are in process of construction.

Reference has been made to cases which hold that telegraph or telephone poles and wires erected on streets or highways constitute an additional servitude, entitling the owners of the fee to additional compensation; and from these cases it is urged that the railway here complained of is an additional servitude, by reason of the poles and wires which communicate its motive powers. There are cases which hold as stated, and there are cases which hold otherwise. But, assuming that telegraph and telephone poles and wires do create a new servitude, we do not think it follows that the poles and wires erected and used for the service of said street railway likewise create a new servitude. Telegraph and telephone poles and wires are not used to facilitate the use of the streets where they are erected for travel and transportation, or, if so, very indirectly so; whereas the poles and wires here in question are directly ancillary to the uses of the streets as such, in that they communicate the power by which the street cars are propelled. It has been held, for reasons that we consider irrefragable, that a telegraph erected by a railroad company, within its location, for the purposes of its railroad, to increase the safety and efficiency thereof, does not constitute an additional servitude, but is only a legitimate development of the easement originally acquired. (19 Kan. 517.) Our conclusion is that the complainants are not entitled to the relief prayed for on the ground alleged, and that the bill be dismissed, with costs.

The road in question is to be built, as we understand it, through the center line of Huron street. We do not recollect that there is any testimony to show that it proposes to go any nearer to this lot than the center of the street; nor is there any testimony to show that, in passing through the street, it will be a hinderance to the entrance upon the lot of plaintiff. The obstruction contended for, as we understand it, is, that the poles themselves may be an obstruction, but it does not appear that any poles will be set in front of this lot, or that by necessity they must be erected in front of that lot. If a case should arise where they should attempt to place a pole directly in front of the front gate, or steps, where it might be an obstruction to a safe and proper egress and ingress to the lot, it might make a case where the party would have a right to redress by way of injunction. The presumption is that the parties, in placing these poles, will place them so as not to interfere with

egress or ingress to the respective lots

We hold that the simple placing of the poles upon the street does not impose an additional burden which would entitle the parties to an injunction.

There still remains one point which we have not discussed and that is the use of the telephone in the house and the interference of telephone wires. The testimony, as we remember it, is that the telephone wire that is brought to this house from the office by a line which runs through the alley between Huron street and the street next directly east; that it crosses directly over Huron street to a place either upon the plaintiff's house or an adjoining house and then carried to the house of the plaintiff, so that the danger from induction is very slight, the testimony shows—we are very clear in our minds that the testimony does not show that there is any sufficient danger which would call for interference upon the ground of danger from induction, or call for interference upon the ground of danger from electricity from the telephone wire or that the railroad wire passing through would be likely to injure anybody who might be at the telephone. It is true that a trolley wire, uninsulated, if it should come in contact with the telephone wire, might throw off a very large amount of electricity, but we see no reason why these wires may not be carried over the streets in such a way that there is no risk and ordinary liability of their coming in contact. Accidents are liable in a great many things we use in our houses daily, as, for instance artificial and natural gas. There was some evidence tending to show induction of the wires in the neighborhood of Adams street and Huron street, which might effect this telephone, but we are unable to see the force of the

conclusions sought to be drawn from that evidence. We think her claim should be confined to any injuries she is likely to receive in her house or about her house. If she would have a right to recover for an interference between the wires at Adams and Huron streets, we do not see why every other person in that vicinity should not interfere—we do not think there is any ground for her to specially interfere in that regard.

Now I believe we have covered the points which have been made. The cause was very ably presented and discussed. We have examined the whole testimony, the citations and these consents in connection with the evidence, in the manner which I have stated. Of course there were some points in the statements of the evidence which we have necessarily left out. Our conclusion is that the bill of complaint will have to be dismissed.

Charles Pratt and Baker, Smith & Baker, attorneys for plaintiff.

Orville S. Brumbaek, Frank H. Hurd and John F. Kumler, attorneys for defendants.

NOTE.—The above case has been affirmed by the Supreme Court (January Term, 1894) without report.

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TOLEDO, OHIO.

DAMAGES FOR ASSAULT.

Relations Subsequent to Assault Evidence in Mitigation of Damages.

(Lucas County Common Pleas Court.—April Term, 1894.)

Ryan vs Sayen. Action for assault to commit a rape. Motion for new trial.

HARMON, J.

The suit was brought by the plaintiff, a widow, against the defendant, a married man, who kept a grocery and lived near the plaintiff. She complained of him for an assault.

It appeared from the testimony that defendant, on one occasion, made proposals to plaintiff to permit a sexual act, which she refused, as she claimed, and repulsed him. On another occasion defendant seized hold of plaintiff in her house, when she was alone, and tried to persuade her to yield to his desires. She then sued for assault and the jury returned a verdict for \$550 for plaintiff. The defendant filed a motion for a new trial.

It appears that after the assaults complained of had been made plaintiff had gone to the defendant's house and associated with his family, and on one occasion stayed there all night. Also that plaintiff went with deft his family on an excursion to Big Ditch.

The court thought that for an assault to a virtuous and sensitive woman damages of \$550 might not be unreasonable but considering how much offense plaintiff took at these advances as indicated by her visits to and association with defendant's family, it seemed to the court that damages of \$550 were excessive and the court decided to set aside the verdict unless plaintiff would remit one half the damages, which she consented to do and after that remittitur the court overruled the motion.

Toledo Legal News.

OFFICIAL LAW JOURNAL OF LUCAS
COUNTY, OHIO.

In the matter of the designation of a daily Law Journal in Lucas County. As required by Sec. 1 of an Act passed April 14th, 1884 and amended Feb'y 25, 1886, entitled "An Act relating to the posting of court calendars and legal notices in certain counties," as amended May 9, 1894, the Judges of the Courts of Record in said County other than the Circuit Court, hereby jointly designate the TOLEDO LEGAL NEWS, a daily law journal published in said County, as the journal wherein until the further order of said judges, shall be published all the notices, advertisements, abstracts and matters and things specified or referred to in said Section 1.

GILBERT HARMON,
REUBEN C. LEMMON,
ISAAC P. PUGSLEY,
Judges of Common Pleas.
I. I. MILLARD, Probate Judge.

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SATURDAY, JULY 7, 1894.

OUR POSITION.

While we have an assurance from the editor of the Weekly Law Bulletin that the LEGAL NEWS will hereafter receive due credit for decisions and news taken from its columns, and we observe a compliance with that understanding in the last issue, we nevertheless feel obliged to answer some of the statements which appeared in the Bulletin last week. The article referred to was followed very closely by the publisher's call upon us and in an interview at this office he was undoubtedly convinced that we were and are able to substantiate every charge made in our attack upon the Bulletin. Such is the case, in any event.

We stated that matter handled in an editorial fashion or as local news items in our paper, had appeared *verbatim* in the Law Bulletin. Those who take sufficient interest in the controversy are requested to refer to L. B. No. 19, page 237. The article, relative to court house bonds, which one might presume was written by the editor of the Law Bulletin, appeared in the LEGAL NEWS some weeks previously and in the exact language used in the editorial column of the Law Bulletin.

We could cite others, but this single instance answers the claim of the Law Bulletin that the only reports taken from

our columns were decisions and that those were sent to Judges to be revised and changed their spots enough to become new creatures ere they returned. The claim that editorial or news items were submitted to any one outside the office of the Law Bulletin is clearly absurd.

The Law Bulletin also stated that one or two decisions copied from our paper and sent to the Judges for revision were re-written, as the report published in our paper was not satisfactory to the Judges. This was a half truth which was in effect a falsehood. The Judges did say that some of the decisions prepared for the first issues of our daily paper were not in proper form for Circuit Court reports and therefore they re-wrote them. The editor of the Law Bulletin admitted that much in his interview with us; his statement, intimating that our publication was, at any time, unsatisfactory to the judges is answered by the fact that all Circuit Court decisions published in the LEGAL NEWS were prepared by the Judges themselves, except those taken recently, and, as our subscribers well know, each decision now passes from the stenographer to the Judge who delivered it, and comes to us directly from the Court. When the Judges have time to do so they write a syllabus of the decision; when they do not, we undertake to do it, at least give enough to indicate the questions involved. In the latter event it is indicated, in justice to the Judges, who might not care to have our syllabi understood to be theirs. We do not deem it necessary to assert that our decisions are absolutely correct. The fact is too well established and known to be honestly or fairly questioned with impunity.

At the close of the article in the Law Bulletin it was intimated, concerning a reluctance to paying for decisions, that we talked in our charges against that paper, in that respect, of matters we knew nothing of. We regret to say that that charge was also based on facts, but we have no desire to press an unpleasant truth too far, and as the L. B. has shown a desire to bury the hatchet, we refrain from again commenting upon the evidence in our possession.

We agree with our contemporary, who impressed us with his opinion that lawyers have little interest in a controversy between Law Journals, and usually the least said the better. We are willing to concede that as a general rule but we believe lawyers are at all times willing, and desire, to be fully informed and in a position to judge the merits of both parties. And in this connection we think it advisable to mention another matter, in view of

breakers which are ahead, either for us or for the L. B.

We refer now to the publication of the Circuit Court reports.

We have no objection if the publisher of the L. B. elects to use any of our reports, with proper credits, in his weekly, reprinting them in his usual two column style, the same as ours. We use nothing from the L. B. for the reason that our subscribers take that paper and there is material enough for two, without encroaching, very often anyway. However if the editor of the L. B. desires our decisions for use in that paper, he is at liberty to use them on the condition named.

Using them in the Circuit Court reports is another matter.

It naturally occurs to a practitioner that the important decisions published in our paper should have a place in C. C. reports. Is it also understood that but for our paper they would not, in the majority of cases, have a place there or any where else? that it was the uncovered fields that induced us to undertake an enterprise which seems to be very acceptable to the bar?

It is certainly a most unreasonable proposition for the L. B. to say that such decisions as the Judges regard as of sufficient importance are furnished to the L. B. and expect the attorneys to believe they are getting all that is important. Judges are willing, for the benefit of the bar, to furnish such decisions as are written, and in many cases will write out those delivered orally, but in the majority of cases, they have no time to do so. Circuits like the Sixth Judicial, with heavy dockets in every county, demand too much judicial work alone, to say nothing of the time required in preparing decisions.

Our own experience is that stenographic reports are necessarily delayed some weeks to give the Courts an opportunity to examine and revise them. It follows then that at least some of the Circuits must be covered by stenographic reports. As example of important decisions otherwise lost is the case published in the LEGAL NEWS last week, a decision rendered four years ago, which so far as we know, or can learn, has never been published.

This leads us to a final statement of our position and that of the publisher of the Circuit Court reports.

We undertake at a large expense to furnish decisions which have, in the past, been lost to the profession. We offer to bind and preserve the reports. The Cir-

cuit Court reporter at once concludes that those decisions, such as he desires, belong to him and he assures his patrons that he will "publish them later."

We do not think it necessary to discuss the matter further. Any fair minded person must see the injustice of the practice referred to and for ourselves we are obliged to say that it will not longer be tolerated. If the Circuit Court reports were a donation to the bench and bar of Ohio we should very gladly join in increasing their number and their value but as it is a private enterprise, bringing an abundant harvest of gold to its projector, we must decline. If decisions published in the LEGAL NEWS are desired by the Circuit Court reporter he should make arrangements with us to secure them. We are in business and always ready to consider a business proposition.

In holding a passenger who rides on a pass bound by a printed condition thereon that the carrier shall not be liable for any injuries to him, the Supreme Court of Washington, in *Muldoon vs Seattle St. R. Co.*, 22 L. R. A. 794, reviewed the kindred case, and said: "But of all the cases called to our attention, or discovered by us in a somewhat extended examination of the subject, there are but eight where the naked question of liability under a free pass with conditions was presented." The cases as to riding on a pass, with other cases of free passage by drovers, express agents, newsboys, and others, are fully reviewed by the annotation to the above case.

A condition in a deed against the sale of intoxicating liquors on the premises is held, in the recent Michigan case of *Jenks vs Parlowski*, 22 L. R. A., 863, to be waived, when the grantor sells adjoining premises without such restrictions, on the ground that such restrictions are sustained only upon the theory that a person in disposing of his property has the right to prevent such a use by the grantee as may diminish the value of his remaining land.

Whether or not a garnishee must set up an exemption of his principal debtor is a question on which the authorities are not agreed, but on which the Supreme Court of Michigan, in *Crisp vs Ft. Wayne & E. R. Co.*, 22 L. R. A. 732, held, against the dissent of two judges, that a garnishee who pays into court the amount due to the principal debtor, without setting up such exemption, does so at his peril.

U. S. Circuit Court.

June Term—Judge Ricks Presiding.

Equity Docket.

983—Macbeth et al vs Globe & C Glass Wks Co. Decree sustaining compts patent and order reference.

1003—Brabeer vs Eversman et al Decree sustaining compts patent. No infringement. To be reported.

1094—Hebrand Co., vs J. H. Merrell et al. Decree dismissing compts bill. To be reported.

1178—VanPelt vs Stowe, admr. Order permitting plff to amend etc.

Law Docket.

945—Ohio Coal Ex vs O. W. Shipman et al. Exceptions to masters report overruled and report confirmed.

1203—Gretcha vs Hall. Demurrer sustained. Bill dismissed.

1230—Kurtz vs Long. Motion for additional security for costs allowed.

1088—Phoenix Furn Co., vs The Put-in-Bay Hotel Co., et al. Second report of recr and app for authority to issue additional certificates.

1088 Same vs Same. Order allowing receiver to issue \$3000 additional.

Fittings.

394—Central Trust Co of New York, trustee, vs Ohio Central R. R. Co. et al. Motion of W. A. White, A. M. White, H. Chapin, Jr., James O. Sheldon, W. G. Wiley, B. G. Mitchell, Geo. W. Powers, Eliza F. Paton, Theodore P. Hicks, Theodore F. Wood and the U. S. Express Co. to set aside and quash service of process against them made by Marshal of Southern District of New York, for the reason that said defendants are not within the jurisdiction of this court, and the court was without authority to issue process against them. Hoadly, Lauterback & Johnson, Jas Irving; R. R. Kinkade, Solrs

Ohio Coal Exchange vs Ozias W. Shipman. Motion for new trial.

1218—Leavens et al vs Bronson et al. Order appointing John P. Cameron, Recr.

1205—The Continental Tr Co., vs The Tol St L & K C R R et al. Answer of the Recr to intervening petn of Isaac Vany. Brown & Geddes, attys.

1182—Farmers L & T Co. vs T A A & N M Ry Co. Answer of Farmers L & T Co. to int petn Post, Martin & Co. Turner, McClure & Ralston and Brown & Geddes, attys.

1182—Same vs same. Ans of same to int petn of Washburn & Moen Mfg Co.

1182—Same vs same. Ans of same to int petn of Consolidated Car Heating Co. Same attys.

1182—Same vs same. Ans of same to int petn of Westinghouse Air Brake Co.

U. S. District Court.

In Admiralty.

169—John M. Ely vs Str Shrewsbury. Praecipe for appearance of Swayne, Swayne & Hayes as Proctors for claimant filed.

Claim of Buffalo Loan, Trust & Safe Deposit Co., Receiver filed.

Stipulation for costs filed. N. H. Swayne and Birchard A. Hayes sureties.

Plea and answer of Buffalo Loan, Trust & Safe Deposit Co. Libel of John M. Ely et al. Swayne, Swayne & Hayes, Proctors.

Plea and answer of claimant to libel of Woodruff and Anderson filed. Same Proctors.

Motion of claimant to discharge return of marshal and vacate process filed. Same Proctors.

169 Jesse N. Dewey et al vs Str Shrewsbury. Libel for hire of Str Douglas, \$80 claimed. I. N. Huntsperger, Proctor.

SUPREME COURT PROCEEDINGS..

Friday, June 22, 1894.

General Docket.

3771. Edward Metz v. John Hagerty, aud'r, et al. Error to the Circuit Court of Hamilton County.

BY THE COURT.

1. The act entitled "An act to tax the business of trafficking in cigarettes or cigarette wrappers," passed April 24, and took effect August 1, 1893, 90 Ohio Laws, 235, is not in conflict with the constitution of Ohio, nor with the constitution of the United States.

2. Said act does not authorize the assessment or collection of such tax for the year 1893.

Judgment reversed.

3679. John A. Romans v. The State of Ohio. Error to the Circuit Court of Harrison County.

BY THE COURT.

In a prosecution for the forgery of a promissory note, when the defendant admits the making of the signature, the burthen is not on him to prove that he had authority. In such case the burthen remains on the state to prove that it was without authority, before a conviction can be had.

Judgment reversed.

3538. Benjamin F. Bushnell v. The State of Ohio. Error to the Circuit Court

of Hamilton County. Judgment reversed. Ground stated in the journal entry.

3648. Perry W. Harris v. The P., Ft. W. & W. R. R. Co. et al. Error to the Circuit Court of Putnam County. Dismissed by consent.

3693. Patrick Burke v. The State of Ohio ex rel. Ella Maley. Error to the Circuit Court of Hamilton County. Dismissed by consent.

3807. Alma N. Frankel et al. v. Thomas E. Davey, Auditor, et al. Error to the Circuit Court of Mahoning County. Judgment reversed on authority of Metz v. Hagerty, No. 3771.

3808. John G. Gortitz, etc. v. Thomas E. Davey, Auditor, et al. Error to the Circuit of Mahoning county. Judgment reversed on authority of Metz vs Hagerty, No. 3771.

Motion Docket.

2199—Jos. Baines, Admr., etc. vs A. G. Licklider, Adm'r et al. Motion by plaintiff to advance cause No. 4066, and to hear with cause No. 3372, on the General Docket. Motion allowed. (June 19.)

2200—The State of Ohio ex rel. Ester-son E. White et al vs Wm Howard Neff et al. Motion by plaintiff to advance cause No 4043, on the general docket. Motion allowed.

2201—Charles Crawford et al vs The State of Ohio ex rel James Devore et al. Motion by plaintiff to advance cause No. 4018 on the general docket. Motion allowed.

2202—Fanny J. Valentine et al vs Union Central Life Ins Co. Motion by plaintiff to reinstate cause No. 3055 on the general docket. Motion allowed by consent of parties. the plaintiff to have 30 days from June 15, 1894, to file printed brief.

2203—The State of Ohio vs Samuel L. Nelson. Motion by plaintiff to advance cause No. 4019 on the general docket. motion allowed.

2204—A. L. Johnson et al vs Daniel Dawson. Motion by plaintiff to extend time to file printed record in cause No. 3983 on the general docket. Motion allowed by agreement of parties and time extended to August 15, 1894, for plaintiff to file printed record. See stipulations.

2205—A. L. Johnson et al vs Samuel Dawson. Motion by plaintiffs to extend time to file printed record in cause No. 3984 on the general docket. Motion allowed by agreement of parties, and time extended to August 15, 1894, for plaintiff to file printed record. See stipulations on file.

ITINERANT VENDORS.

Act to Prevent and Punish Fraud in Sales of Wearing Apparel at Public or Private Sale is Unconstitutional.

(At Chambers, Findlay, O., before J. H. Day, a judge of the Circuit Court, in third judicial circuit. June 16, 1894.)

In the matter of the application of M. S. Mosler, J. M. Mosler and N. M. Fletcher for discharge from imprisonment on *habeas corpus*.

(A law regulating the business of itinerant vendors of wearing apparel is not in conflict with constitutional rights because it does not assume to regulate any other business or trade. Said act is not in conflict with Sec. 1 Art. 12 of the constitution which provides for the taxation of property by a uniform rule for it does not levy a tax on the property; it clearly lays the burden of a tax on a business or occupation defined and described in the law.

Regulating a business or occupation by license and the imposition of a tax or fee, by law, is upheld, not on the broad ground that it was within the general powers of the legislature, as declared by the constitution, to levy taxes for revenue, but on the narrower ground that a special benefit is conferred on those who follow an occupation, or that the occupation imposes a special burden on the public or is injurious or dangerous to the public. ED. LEGAL NEWS.)

DAY, J.

The applicants make a showing and complain they are unlawfully imprisoned and deprived of their liberty by the sheriff of this county. A writ was allowed on the application requiring the officer to show cause, if any there was, for the detention of these persons. The sheriff made return of the writ, *together with a statement of the facts upon which the right of detention was based. The essential facts are, in substance:* That the parties, Mosler, Mosler and Fletcher were arrested on complaint of one Scofield and taken before a magistrate, charged with violating the provisions of an act of the General Assembly, "To prevent and punish fraud in sales of wearing apparel at public or private sale by itinerant vendors and to regulate all such sales," passed April 23d, 1894, and took effect on its passage. The magistrate found them probably guilty and required them to enter into recognizance, with sureties, for their appearance before the

Probate Court to answer the complaint. They made default in the requirement and were by the magistrate committed to prison. The return of the officer further shows the parties are detained in custody by virtue of a mittimus or warrant of commitment issued by the magistrate commanding him to receive them into custody and to safely keep them to answer a criminal charge preferred against them, in violating the provisions of the law in question, which requires the procurement of a license from the state and a special deposit of money in the sum of \$500 with the Secretary of State, before advertising for sale or selling wearing apparel as itinerant vendors.

Applicants concede they are detained by reason of the mittimus issued by the magistrate in a proceeding instituted and carried forward under warrant of the law in question; yet they claim their detention is unlawful, for they say the magistrate had no right to make the order putting them in custody, that he had no jurisdiction in the matter, and for want of such jurisdiction the order is a nullity and void; and because it is void they claim they are entitled to relief on habeas corpus.

Section 5729, R. S., provides: "If it appear that the person alleged to be restrained of his liberty is in custody of an officer under process issued by a magistrate and that the magistrate had jurisdiction to issue the process, the writ (habeas corpus) shall not be allowed; or, if jurisdiction appears after the writ is allowed, the person shall not be discharged by reason of any informality or defect in the process or order." By the law in question, an offense is defined, of which the magistrate had jurisdiction to inquire into and make an order of commitment, and so, jurisdiction of the magistrate, is made to appear after

the writ was allowed, and it follows, if the act of April 23d, 1894, is a valid enactment, the applicants are not entitled to relief in this proceeding. If the law is valid the magistrate was clothed with jurisdiction to examine into the matter of alleged violation of law and issued the order or process of commitment, and under the provisions of the section just quoted mere informality or defect in the process will not authorize a discharge. In such case a proceeding in error would be the proper remedy. If, however, the act, under which the order of commitment was issued, is invalid, it conferred no jurisdiction on the magistrate; the order of commitment issued by him is void and relief from imprisonment thereunder may be obtained by habeas corpus. This is laid down as the rule by the statute and also by the Supreme Court in the 7 O. S., 81, where it is said: "Imprisonment under a sentence cannot be unlawful unless the sentence is an absolute nullity; and if it is clearly unauthorized and void, relief from imprisonment may be obtained by habeas corpus. But if the sentence is not void absolutely a petition in error is the appropriate remedy." The precise question, therefore, raised in this case is: Is the act of April 23, 1894, a valid enactment; or is it invalid because in conflict with some provisions of the Constitution of Ohio, or of the United States? The act provides that no itinerant vendor of wearing apparel shall advertise, represent or hold forth any sale as bankrupt, insolvent, etc., or closing out sale, or, as a sale of any goods damaged by smoke, fire, water or otherwise until he has first represented the facts, under oath, to the Secretary of State, deposited \$500 with the secretary and procured a state and municipal license authorizing such advertisement and sale. Severe penalties to be en-

forced by fine and imprisonment are provided for violation of the requirements of the act. Counsel for applicants contend the act unconstitutional on a variety of grounds, but no particular section or article of the constitution is pointed out as being violated. It is said it discriminates against one particular kind of goods and does not affect any other, all other trades or business being unaffected by it. That may be true so far as this law is concerned for it does not assume to regulate any business or trade except that of itinerant vendors of wearing apparel; but if true, does that fact make it inimical to any provision of the Constitution? I think that fact does not furnish a test to determine if the law is constitutional or not.

It is said the law excludes goods and merchandise from outside of the state and because of it, is in opposition to interstate commerce and in conflict with the Constitution of the United States. This claim is not sustained or made apparent by a careful reading of the text. No goods or merchandise are excluded, but all are permitted to come in, so far as any provision of the act is concerned, only the itinerant seller of such goods is regulated by the act and a deposit of money required as an indemnity to persons who may be defrauded or damaged by such seller. The criticism, that the law discriminates between citizens of this state, is not well founded; for it does not. Every citizen that engages in the business of an itinerant vendor of wearing apparel which has been smoked or damaged or must be sold at a sacrifice, is subject to the rule made by the law. None are exempt from its requirements, so there is no discrimination at all.

Again: It is said that the act levies a tax on property, not by a uniform rule and without refer-

ence to the true value of the property. If that were so, the claim of invalidity, made by counsel would have to be allowed, as taxes on property by express provision of section 2 of article 12 of the Constitution, must be by a uniform rule and according to its true value in money. The act in question does not levy a tax on property by such uniform rule and according to its money value; nor, I think, does it assume to levy a tax on property at all. It clearly lays the burden of a tax on a business or occupation defined or described in the law; and its object seems to be to prevent fraud as much as may be, and to provide indemnity for the unfortunate public as against damage coming to it, from frauds liable to be practiced by irresponsible persons in the conduct of that particular business or occupation. That this may be done with propriety, and without in the least impairing or infringing any of the provisions of the fundamental law, has been held by the Supreme Court a number of times, notably in the 45 O. S. 63. Even the case of *Sipe vs Murphy et al*, 49 O. S. 506, cited by counsel for petitioners as bearing on the question, holds the doctrine that the legislature may authorize a municipal corporation to regulate a business or occupation by ordinance, by the imposition of a tax or license fee, only the regulation and tax or fee charged must not be unreasonable. If the legislature has the constitutional power to regulate and license an occupation indirectly, through the channel of a municipal corporation, it certainly has power to do the like directly, as it has done in the act under consideration, and without the intervention of a municipal or other corporation.

But the decision of the Supreme Court in the 45 O. S. is directly in

point and decides the questions in this case adversely to the claim of the petitioners. The court reviews the legislation and decisions of the Supreme Court on the subject and shows very clearly, I think, that the General Assembly has constitutional power to regulate business or occupations, by license, and to compel the payment of a reasonable tax or fee, by imposition of a fine. The Judge announcing the conclusions of the court on page 68 uses the following language: "The power to tax or regulate by license arises from the general legislative power given by section 1 of article 2 of the Constitution, and is not derived from section 2 of article 12.

"The latter section is but a limitation upon the taxing power, and it has often been held that the requirement of this section is simply that the taxes upon property, as such, shall be by a uniform rule, but that this does not impair the power of the General Assembly to use its discretion when the burden is not placed on property. Section 2 article 12 by no means exhausts the taxing power."

In some of the cases decided and indeed in the case in 45 O. S. the regulating of a business or occupation by license and the imposition of a tax or fee, by law, is upheld, not on the broad ground that it was within the general powers of the legislature, as declared by the constitution, to levy taxes for revenue, as perhaps it might have been, but on the narrower ground, that a special benefit is conferred on those who follow an occupation, or that the occupation imposes special burdens on the public, or is injurious or dangerous to the public; and the General Assembly may well have had one or more of these grounds in mind when it enacted the law in question. Itinerant vendors, of alleged smoked, damaged or bankrupt stocks of wearing apparel, had

become, in some localities, an intolerable and all-pervading nuisance. They were in fact very prevalent. In many instances the vendors were possessed of *bona fide* bankrupt or other stocks of goods and the public secured bargains really beneficial; while in many more the vendors were unscrupulous swindlers and dangerous to the unsuspecting public in a high degree. In such cases the public was at the mercy of the rascals, and many a well disposed and innocent citizen was misled and made to yield up his hard-earned ducats for a mess of shoddy. At times, swindling, in such and kindred transactions, become epidemic. What with Bohemian Oats, Redline wheat, alleged bankrupt sales of wearing apparel by itinerant vendors, and other schemes to catch and trick the unwary, no rest or safety for the unsophisticated was to be found. Some legislation seemed necessary to protect the public from the unscrupulous itinerant vendors, and the seeming demand for legislative action culminated in the enactment of the law which is said to be unconstitutional. May not the law be upheld as valid and constitutional, on the ground that it regulates an occupation that is injurious and dangerous to the public, if not upon the broader ground that its enactment was within the general powers of the legislature to levy taxes for revenues? The Supreme Court has repeatedly held that such legislation is not in contravention of the Constitution, but is clearly authorized by it; at least so in cases and under conditions where it seems to be demanded in the interest of the public, as protecting it from a prevailing and positive evil.

Adopting the language of Judge Spear, in 45 *State*: "I think it may safely be affirmed, upon both principle and authority, that the power to regulate by license and to

compel payment of a reasonable fee, may be maintained where a special benefit is conferred at the expense of the general public, or the business imposes a special burden on the public, or where the business is injurious to, or involves danger to the public. And believing that the exactions required by the sections of law in question here fairly come within the rule thus stated," I hold the law of April 23, 1894, to be valid.

The prayer of the applicants for relief is denied and their application dismissed.

Meehan & Jourdan for Petitioner.
G. W. Ross, W. H. Kinden & Theodore Totten, *Contra*.

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CONSTRUCTIVE NOTICE.

Possession of Land by Grantor Under Contract Improperly Recorded.

(Huron County Circuit Court, April Term, 1894. Present: Hons. C. S. Bentley, P. J., C. H. Scribner and G. R. Haynes, J. J.)

Marshal W. Lowe vs The W. & L. E. Ry Co. Appeal from Huron County Common Pleas Court.

(L. owning a farm through which a railway company desired to construct a railroad, executed a contract in 1889 whereby he agreed to convey to said company a right of way over said property upon condition that said company construct an under cattle pass, connecting the portions of the farm divided by the railroad. In 1893, after the construction of the cattle pass, in apparent conformity with said contract, L. conveyed to the railway company a right of way across his farm; the deed was without reservation and contained no reference to the cattle pass. The railroad was subsequently sold, under foreclosure proceedings, and the purchaser sought to fill up the cattle pass, which had remained in possession of L. and his heirs from the time of its construction, claiming that the contract for its construction having been recorded in a record of deeds was of no effect it giving to subsequent purchasers notice of L's rights under it; and that possession of land retained by the grantor after he has made a deed, conveying the land, is not notice to any purchaser who takes from his grantee. **Held**, that L's possession was not inconsistent with his deed to the railway company of a right of way for railroad purposes and that therefore, under the general rule that the possession of lands by a person is constructive notice of whatever right he actually has in the lands, his possession was notice to those who subsequently dealt with the land in question; that whether or not the railway company could be required to maintain the cattle pass, the original contract providing only for its construction, it had no right to fill it up.

Such a contract, containing stipulations to be performed by the Railroad Co., though signed only by the party of the first part, is as binding as though officers of the Railway Co. had all signed it. **Ed. Legal News.**)

BENTLEY, J.

Mr. Lowe brings this action to obtain an injunction against the defendant, the Wheeling & Lake Erie Railway Company, to prevent the company from filling up a certain cattle pass which now exists under its railway track connecting two parts of the plaintiff's farm. The company admits that it is its purpose to fill up the cattle pass and denies the right of the plaintiff to the injunction forbidding it so to do.

The case being appealed to this

court, it has been tried before us upon the pleadings and statement of facts and the evidence adduced, including certain records from the county records here.

The land in question, the farm of the plaintiff, is the east half of lot No. 147 of the 4th section of Townsend township, Huron county, Ohio. This farm originally contained about 100 acres of land. In 1880, the predecessor of the defendant company, the Wheeling & Lake Erie Railroad Company, desired to construct its line of road through this farm and applied to Alpha Lowe, the father of the present plaintiff, who then owned the farm, for permission so to do. He permitted the railroad company to construct its track through the farm and entered into a certain written contract with it by which he so permitted it. The construction of the road seemed to require a high grade across this farm of 10 or 12 feet in height and the road so crossed the farm that it left to the south of the grade a part of the farm of 7 or 8 acres in extent, the rest of the farm being upon the north side of the grade. The contract was signed by Mr. Lowe only, and sealed by him, but when accepted by the railroad company under such circumstances, so far as the contract contained stipulations to be performed by the railroad company, it was bound to perform them, the same as if its officers had in fact signed the contract.

The contract provides as follows:

"Know all men by these presents, that I, Alpha Lowe, of Townsend township, in the county of Huron, state of Ohio, in consideration of one hundred and fifty dollars cash to be paid, and the further, consideration of the public good and the benefits which will accrue to me from the construction of the Wheeling and Lake Erie Railroad, do agree that said company may locate and construct its road upon or through my land situate in the county of Huron, Townsend township, state of Ohio, and described as follows, to-wit: Being the east half of lot No. 147, in the 4th section of said township, and being the farm on which I now reside, said company to construct an under cattle pass, if practicable, also one over-crossing at grade, and if the said road shall be under contract or process of construction not later than two years from this date, I hereby covenant and agree for the above consideration on demand to convey to said company for railroad purposes for single or double track, sixty-six feet in width, that is to say, 33 feet on each side of the center of said road, as the same may be located or constructed by said company over or through said land by a good and sufficient deed of conveyance to said company, stipulated as hereinbefore and after, and binding on me and my heirs and assigns, said sum to be paid in full before possession taken and said sum to cancel a claim I now have against said company for ten dollars for injury to my corn.

In witness whereof, I have here-

and set my hand and seal this 4th day of October, 1880.

[SEAL.]

"ALPHA LOWE,

"Attest, R. H. Cochran, W. W. Graham."

After the making of this contract, this grade was made across this farm as stated. In apparent compliance with the contract the railroad company did construct a cattle pass some 10 or 12 feet in height and with a clear space high enough so that a wagon with a rack might be driven through, thus creating a pass between the northerly part of the farm with that left upon the southerly line of the grade.

Thereupon shortly afterwards, when the railway came to be fenced, the fence was made with reference to the use by the land owner of this cattle pass in connection with the farm, that is, the fences upon the line of the road were turned in to the edges of the cattle pass on both sides so that there was free ingress and egress for cattle and for anything that the owner wished to pass through there from one side of the farm to the other. That situation was maintained from that time until the present, and it is the cattle pass thus built and maintained that the present owner of the right of way designs to fill up.

In 1883, after the making of the cattle pass in apparent conformity with the stipulations of the contract, Mr. Lowe made a deed to the railroad company, and as its terms are important, at least, a portion of the terms, and as the deed is short, I will read it:

"Know all men by these presents,

that we, Alpha Lowe and Maria wife of said Alpha, of Townsend township, Huron county, Ohio, in consideration of the benefits to accrue to us from the construction of the Wheeling and Lake Erie Railroad and the sum of one hundred and fifty dollars in hand paid by the Wheeling and Lake Erie Railroad Company, here receipted, do give, grant, bargain, sell and convey unto the said Wheeling and Lake Erie Railroad Company, its successors and assigns, a strip or parcel of land containing one and 74-100 acres more or less, through the land of said grantor, situate in the east half of lot No. one hundred and forty-seven, (147,) section four, (4,) Townsend township, Huron county, Ohio, and which is described as follows:

"A strip of land sixty-six (66) feet wide commencing at the east boundary line of the lands of John G. Bott, being the west half of said lot on the west, and thence running southeasterly to the west boundary line of lot No. one hundred and forty-eight (148) in said section on the east.. Said strip or parcel of land is 66 feet in width, that is to say, 33 feet on each side of the center line of said railroad, as the same is located through said land from a point on the west boundary line of said land to a point on the east boundary line of the same as above described.

"To have and to hold said described strip of land to said, The Wheeling and Lake Erie Railroad Company, its successors and assigns

for the purposes of said railroad and as its right of way."

Then follows the release of dower by Mrs. Lowe and the usual formalities in the execution of a deed.

This deed being delivered to the railroad company, was shortly thereafter filed for record and duly recorded in the proper volume of records of deeds of this county. Before the making of this deed, the railroad company had mortgaged its entire line of property to certain persons in the East for a large sum of money borrowed, and that mortgage was duly recorded. After the making of this deed, in July, 1884, the mortgagees of the railroad company began an action in the United States Court for the northern district of Ohio, eastern division, against the railroad company, for foreclosure of this mortgage, and such proceedings were had in that case that the mortgage was foreclosed, and the property thus mortgaged, ordered to be sold, and on the 23rd, day of April, 1886, the Special Master Commissioner appointed by the United States Court in that proceeding, sold, under the decree of the court, the railroad property to certain three persons named as trustees, and those trustees afterwards, for a valuable consideration, on the 25th, day of June, 1886, conveyed the property thus purchased by them to the defendant in this action, The Wheeling & Lake Erie Railway Company.

The contract in question given by Mr. Lowe, was recorded, but recorded in the records of deeds, and

it is claimed that that record being in a volume not designated by the law, is of no moment in a trial of this case; that is, it affords no constructive notice to this railway company of the existence of such a contract, and that the record itself is not receivable in evidence for any purpose; and it is claimed that the railway company as well as these trustees were innocent purchasers of this property; that they had no notice, neither actual nor constructive of the terms of this contract, or the obligation of the railroad company to either construct or maintain this cattle pass, and that therefore, whatever the rights of Mr. Lowe may have been as against the original railroad company, he cannot assert them or enforce them as against the present railroad company. I will state perhaps what I omitted to state, that Alpha Lowe having died, the title to the farm descended to the present plaintiff, Marshall W. Lowe, or was conveyed to him by deed; at least, Marshall W. Lowe now stands in the place of Alpha Lowe as to this transaction.

The plaintiff claims that whatever may have been the effect or want of effect of the record of this contract, yet the contract was made, and that, ever since the construction of this cattle pass, Mr. Lowe, the plaintiff, or his father, while each respectively held the title, was in the actual and notorious and apparent possession of this cattle pass; that it connected the two portions of this farm, and that it was observable to any persons who came with-

in sight of the railroad or of the farm at that point, and that therefore such possession was notice to the subsequent purchaser of the railway property.

The railway company deny that that was constructive notice to it and it also alleges that the contract itself did not require the *maintenance* of a cattle pass; that the contract simply required a cattle pass to be *constructed*, but was silent as to any maintenance of it. The counsel for the railway company, however, admits that if this road were still in the possession of the original company with whom the contract was made, it would have no right or authority to fill up the cattle pass; that although it had not, in terms, contracted to maintain it, yet it could not, at least, fill it up.

The plaintiff claims, however, that the contract, fairly construed, requires the maintenance as well as the construction of the cattle pass in question.

The counsel for the railway company, in endeavoring to sustain its position regarding the want of constructive notice by possession, cited this rule; that while as a general thing, it is true that actual possession of real estate is constructive notice to every person and the world as to any real rights that the possessor has in the real estate, yet that there are exceptions to that rule and among them is this exception,—that the possession of land retained by the grantor after he has made a deed conveying the land, is not notice to any purchaser

who takes from his grantee, because having granted the title to the land, it will be presumed that he is simply a tenant at sufferance of his grantee, and that a subsequent purchaser from the grantee has a right to so assume; but while that is, by the great weight of the authorities, the general rule of law, there are some cases that hold otherwise, apparently though, not the majority. As a matter of interest, I would say that it would seem that this rule is not followed, and apparently not recognized in the case in the 32 *Me.*, *McLaughlin vs Sheppard*; nor in case of 51 *Maine* 161, *the case of Boggs vs Andrews*; nor in a certain California case.—I think it is 25 *California*, nor in a case in the 89 *Illinois*, page 460, nor in the 107 *Illinois*, page 136, and the matter is also noticed in the 2nd *Leading cases in Equity*, page 184.

Now, this general rule rests upon this proposition, that the grantor of a deed cannot claim possession in conflict with the terms of his deed; that where he is found in conflict with the terms of his deed; it may be presumed that he is simply a tenant at sufferance, and such possession is not notice to those who subsequently deal with the grantee regarding the land. And the question now is whether in this case, the facts bring the parties within the operation of this rule.

I call attention to the terms of the deed. It is a deed which grants in the granting clause to the railroad company this strip of land; but in the *tenendum* clause it recites,

"To have and to hold said described stip of land to said, The Wheeling and Lake Erie Railroad Company, its successors and assigns, *for the purposes of said railroad, and as its right of way.*"

The scope and title then, which the railroad company took to that land was the title for the purposes of its railroad, and as its right of way. It was then not in every sense an absolute deed of the whole property for any purpose whatever for which the railroad company might see fit to use the land, but for the purposes recited.

Now if this possession which the grantor so retained in the land was in conflict with the terms of his deed, his possession would come under the general rule which I have mentioned, and as against subsequent purchasers in good faith, from his grantee, he could not claim that his possession was constructive notice. But was the possession which he retained and which he had all these years in conflict with the terms of his deed?

It is not claimed in this action, by the defendant, the railway company, that the use of this cattle pass is inconsistent with the use of this land for the purposes of its railroad, and as its right of way; it makes no such claim as that either by pleading, or by proof offered, but it simply assumes the absolute right to fill it up regardless of the want of any necessity for so doing for the purposes of its railway.

It is a matter of common knowledge that these passes are frequently constructed and maintained un-

der railway grades, and it is a use that is entirely consistent with the use of the right of way for railway purposes, and when the plaintiff is allowed to retain such possession of so much of a mere right of way, his possession is not in conflict with the terms of his deed, and it is consistent with it, just as consistent as is his right to an over pass, or as the rights of any person to whom the railway company might allow a pass under its grades.

Among the cases cited in support of this general rule, that the grantor cannot claim that his subsequent possession of the land granted, in conflict with the terms of his deed is constructive notice to the world, are many cases from Michigan, and no state holds any firmer to this doctrine as appears from the reports than that state, yet in a case which occurs in the 18th, *Michigan* page 367, in the opinion on page 377 and 378 is this language: "The counsel for plaintiff in error relied upon *Palmer vs Anderson*, 8 *Michigan*, 395, and *Dawson vs Dunbar & Company*, 15th, *Michigan*, 489, to show that where the grantor remains in possession after conveyance, he is to be regarded as holding under his grantee and not by any other claim.

"Those cases hold that such possession after conveyance is not notice of any other claim as against third persons; but they do not hold that it is incompatible with any other right as against the grantee, if any such existed, and is not inconsistent in fact, with the existence of the grant."

Now, these cases we think, rec-

ognize this distinction that I have endeavored to point out. So that leaves the operation of the other general rule, which is not denied, that the possession of lands by a person is constructive notice of whatever right he actually has in the lands and for the disposition of this case, it is not necessary to decide whether or not this contract should be construed as requiring the railway company to maintain a pass. It is sufficient to show that the contract required the company to make it, in the first instance, and following from that necessarily would be the impropriety and illegality of the act of the company to fill up the pass, the company that was bound by this contract to make it, so that the original railroad company would have had no right whatever to fill up this pass, even if it was not bound actually to maintain it, that is, to keep it in order etc., and the plaintiff being in possession at this time, at the time of the sale and purchase of this property, we think such rights as he would have in the premises as against the railroad company, might be maintained notwithstanding the purchase of the property by the railway company.

This contract, whatever may be the requirements, whatever acts it might require, in the first place, is continuing so far as it was not performed by the making of the deed, as far as the grantor is concerned, and in this connection, attention is called to the case of *Reed vs Sykes*, 27th *Ohio State*, the third paragraph of the syllabus being: "The covenants of the vendee contained in such contract of sale, to assume and pay off said mortgage as part payment of the purchase money, are neither performed, satisfied, surrendered, nor merged by the

mere conveyance to him by the vendor, in the absence of anything in the deed, or the acts of the parties showing that such covenants of the vendee have been in fact performed or satisfied."

Again in 45 *Ohio State*, the case of *Brumbaugh vs Chapman*, page 368, in the opinion of the court, on page 375, speaking of this matter, this is said: "The case of *Reed vs Sykes*, 27th *Ohio State*, 285, cited to us, is quite different from the one presented by the record before us, and is not in conflict with what has just been announced. It was there simply held that the deed did not execute a prior agreement of the vendee to assume and pay an existing lien upon the property, that had been assumed by the vendee as part of the purchase money. . . . As a rule, the deed does not execute any of the stipulations of the vendee as to the consideration to be paid for the property. Its office is to execute the agreement on the part of the vendor, and the learned judge, in delivering the opinion in that case, was careful to observe this distinction, in the use of the language: 'The obligation to pay the purchase money was not merged by the deed, which was only in performance on the vendor's part. . . . The covenant to convey is performed by the conveyance; but covenants relating to other things than a mere conveyance, are not thus performed.'"

Now, in view of the open and notorious character of this possession and all the circumstances attending it, we think it would be grossly inequitable for the railway company to be allowed to fill up this cattle pass, and the finding and decree of the court will be in favor of the plaintiff and against the defendant.

Andrews Bros. for plaintiff.

Swayne, Swayne & Hayes and S. A. Wildman, for defendant.

U. S. Circuit Court.

PATENTS.

Assembling of Old Elements, Well Known to the Art. Bill Dismissed.

(In the Circuit Court of the United States for Northern District of Ohio, Western Division, June Term, 1894. Present, Hon. Augustus J. Ricks.)

Harbrand Company vs John H. Merrill et al. - In equity. Decision June 29, 1894.
RICKS, J.

This is a suit in equity for an infringement of letters patent of the United States, No. 277,725; covering improvements in running gear for vehicles, granted May 15th, 1883, by the complainant, as the assignee of Jacob Harbrand.

The bill avers title in the complainant, and charges infringement against the defendant, and prays for an injunction and an accounting. The defendants by their answer admit that the letters patent in suit were issued as averred in the bill, but deny that Jacob Harbrand was the original and first inventor of the subject matter thereof, and that the same was not known or used before its alleged invention. The answer also sets up by way of defense eighteen United States patents as anticipatory, all but one of which have been offered in evidence by the respondents; also alleges use by six witnesses and a knowledge of the invention by nine others, prior to the date of the patent in suit. But of these persons, 15 in all, only one is called to the stand, and he testifies as to his knowledge. The issues thus presented by the pleadings, are: first, whether the patent is valid, in view of the prior

state of the art; and second, whether it is infringed by the defendants.

It appears from the complainants exhibit "File wrapper and contents" that on the 25th day of May, 1882, an application in due form of law was filed in the patent office, praying for the letters patent set forth in the bill. Said original application contains six claims. The first, broadly, for a rear king-bolt; the second, identical with the present second claim of the patent; the third and fourth claims for upper and lower fifth wheel plates respectively, having their faces grooved; the fifth, for an upper plate having a front eye and a rearwardly extending arm; and the sixth, for connection between the rear axle and the reach; also a new claim, which was substantially a re-statement of claim five.

Of these claims, the first, fifth, and sixth and said new claim were canceled by the applicant, those remaining being re-numbered and officially allowed. Subsequently, however, the case was by the examiner withdrawn from issue, and reference having been found for claims two and three in a patent to 10th of March, 1869, No. 87,429, whereupon all claims were erased, and the present claims of the patent substituted. One change, it will be observed, was the original second and it was canceled simply for the purpose of presenting the claims in consecutive order and more concise form.

The defendants are dealers in vehicles and in the usual course of their business purchased a buggy

from the Franklin Buggy Co., of Columbus, Ohio. It had on it the fifth wheel complained of, which had been made under a license from the patentee, Charles A. Behlen, whose patent, No. 440871 is in evidence.

The object the inventor had in view in his patent is perhaps as fairly stated in his specifications as he can claim. It was a combination of elements of existing patents or what was known to the art, so as to give him a fifth wheel, in which the king-bolt should come behind the axle, for the double purpose of giving it a location where it could be easily applied and removed, and so that all the parts comprising the front gear are firmly and properly connected together without the necessity of cutting or boring the axle and head block, thereby impairing the strength of the same. By this construction the complainant insists that the running gear can turn in a shorter space, and the wheels can be moved farther apart than others in common use, making it more convenient to get in and out. These are the substantial and practical results he started out to accomplish. He found as known to the art at the time of his invention every element of his combination, and in many patents in evidence the same connection he has made.

In his first claim he says: "In a running gear for vehicles a combination with the fifth wheel plates, axle, head block and reach, of the king bolt, connecting said fifth wheel plates in rear axle and head

block to an arm or stay extending from the reach and secured to the upper fifth wheel plate, as and for the purpose set forth."

I have read the evidence carefully, and have examined patents and models exhibited, and I do not think the complainant's assembling of the elements he has put in his patent involve invention. I am confirmed in this conclusion by the fact that fifth wheels have not been constructed under his patent, or put upon the market and used. While that is not a legal test of the claim of invention, it is evidence that there is something lacking in the device to make it practicable and merchantable. There are few devices more commonly used than these fifth wheels on vehicles. Those are in daily and constant use and if a new and useful invention in this line is claimed, but not practically used, it is a fact that may well challenge scrutiny and draw examination to the invention claimed. The result of this examination convinces me that all the combination made of the elements at the time well known to the art, had been in fact made before and put into use. The invention claimed is but one step in a series of improvements, so that the patent must be restricted to the precise arrangement and form of the parts as described and for the purpose indicated. *Bragg vs Fitch*, 121 U. S., 478. So when we go through the different elements—the upper and lower plates, the manner in which they are fastened, axles, head block, the rearwardly extending arm, and the

manner in which it is fastened, and the upper fifth wheel plate—we find them old elements, and combined only as the skilled workman would readily do it, but not so as to use the invention, when you restrict the combination as the patentee has defined it.

I see no way in which this bill can be maintained, if the claims are construed broadly as the complainant contends, the invention is fully disclosed as the former art, and if complainant is limited to the construction shown and described, there is no infringement. This is true as to both claims.

The bill will therefore be dismissed at complainant's costs.

HOT AIR PIPES.

Thomas J. Bradbeer, et al., vs Ernst A. Eversman, et al. In equity. Decision, June 30th, 1894.
RICKS, J.

This is a suit for infringement of letters patent of the United States, No. 390438, granted to Thomas B. Bradbeer, dated the second of October, 1884, for hot air flue.

The complainant limits his patent to a single claim, which is described as follows:

"A hot air pipe, consisting of an inner hot air flue, an outer air flue. The inner wall beveled outward and the outer wall beveled inward, at one extremity, and the metal of each engaged with the other, forming a perfect false wall at the extreme end of the pipe. Said pipe, at its opposite end, having the inner and outer walls united by a separate thickness of metal extend-

ing from the extreme edge of the outer wall, passing downward between the walls a short distance thence across and outward again to the extremity of the inner wall, and perforated along its bottom or cross-wall portion, whereby there is formed a mortised cavity of double thickness, substantially as described."

The prior art showed the use of double pipe for hot air furnaces. This pipe was not made in sections in fixed length, but was generally made to order after measurement; so that it was not manufactured in large quantities and carried in stock, or sold to dealers in that way. When furnished in quantity, a slight joint was put in the center of the long sections, with stays.

In this condition of the art the complainant's patent was allowed. He had claimed more in his original application than his single claim allowed; but that was granted, and for the particular construction claimed. Under this patent the trade in hot air pipes became common then. The pipe was made in sections. Its construction was such as to make it firm, safely handled, and easily put together by any proper workman, and made in short sections, so as to be used in all kinds of buildings. Complainant's experts set forth these advantages fully, and they seemed to be supported by an examination of the exhibits offered at the hearing.

The defendant produced exhibits of prior patents; but while some of them show pipes for carrying hot air, doubled, necessarily they show

a construction such as complainant's, embracing the advantages claimed. There is proof as to prior use, but as no notice of such prior use was set out in defendant's answer, evidence as to such use is inadmissible, and cannot be considered by the court.

The invalidity of complainant's patent must be limited to the restricted process, or manner of its manufacture, as he has described it. This does not seem to have been anticipated in any of the patents offered in evidence by the defendants. The claim to validity is therefore established. It rests on a slender basis, but sufficient to justify the court in holding the patent valid.

The defendant's pipe bears a close imitation to that of complainant, but, as stated before, complainant's patent must be limited to the particular construction described. It calls for inner and outer walls, beveled outwardly and inwardly, and engaged at the extreme end of the pipe by a cross wall perforated. But there is no bevel in the defendant's pipe. The exhibits do not show such a bevel, and the witness who made the machinery for defendants testified that it was not made to bevel the tin.

Defendants' counsel has fairly set in parallel columns the respects in which the two pipes differ, and that contrast is here set forth.

COMPLAINANT'S PIPE.

The walls are beveled toward each other to form a slip end.

Both walls are slotted so as to form perforations when the edges are engaged together.

The perforations are at the extreme slip end which rests directly upon the diaphragm in the socket end of the adjacent pipe and has no other support.

The joint is formed by simply telescoping. The walls of the slip end both pass into the socket between the walls of the socket end.

DEFENDANTS' PIPE.

The walls are bent inward at right angles leaving the walls otherwise in parallel planes.

Only the inner wall is cut to form perforations.

The extreme end of the pipe is a solid tenon or rib, as it is called in defendants' claims and the slip end has four distinct supports.

The walls of the slip end do not pass between the walls of the socket end at all, and the joint is formed by an entirely different construction, to-wit:

The solid tenon and an unperforated mortise, and the close fitting rectangular supports.

For these reasons I do not think the defendants' pipe is an infringement of the pipe covered by the patent.

There may be a decree entered sustaining complainant's patent, but finding no infringement.

APPEARANCE.

(In the United States Circuit Court for the Northern District of Ohio, Western Division. Present, Hon. Augustus J. Ricks).

Benson Bidwell et al vs The Toledo Consolidated Street Railway Company. Motion to make parties defendant. Decided June, 13, 1894. RICKS, J.

This is a motion by the com-

plainants to make the Thompson-Houston Co. and the General Electric Co. defendants to the supplemental bill. The motion proceeds upon the theory that the parties have already actually entered their appearance in court, the first by virtue of a contract made between the Thompson-Houston Co., the vendors of certain patented appliances to the Toledo Consolidated Street Railway Co., the user of such appliances, and second, by reason of the conduct of the General Counsel for the Thompson-Houston Co. in appearing for that company in the litigation.

This motion and claim is first supported by an alleged interview between a reporter of the Blade, in this city, and Mr. Lang, the general manager, I believe he is, of the defendant, the Consolidated Street Railway Co. In that interview Mr. Lang's attention was called to the suit brought against the defendant by Mr. Bidwell, and he averred in reply to the inquiries that the suit was a matter of very small concern to the Toledo Consolidated Street Railway Co., as it had a contract with the Thompson-Houston Co. to protect it in the use of its electrical appliances, and that that company had agreed to hold the Consolidated Street Railway Co. harmless and safe, by virtue of that contract. And in the next place, by reason of certain averments or statements made by Mr. Hyde, who, it is alleged, has appeared in the case as general counsel for the Thompson-Houston and General Electric Co.

The interview with Mr. Lang is

verified as to the accuracy of it by a young lady who was reporting for the Blade at the time, who makes an affidavit that in substance that interview was correctly reported. And the affidavit of the complainant is on file as to the statements made by Mr. Hyde, in which he was asked to stipulate for the allowance of a certain matter to be filed as evidence in the case, in which he said if he appeared here for himself he might consent to it, but that as he appeared for the Thompson-Houston Co., he was obliged to act under his instructions, and in that relation, and for that reason, he refused.

- It is not claimed that the Thompson-Houston Co., or the General Electric Co., were made parties defendant in the original bill. Of course, where a party is named as a defendant in the original bill, and he appears and enters his appearance for the purpose of contesting the jurisdiction or the regularity of the service of process, under that theory that it takes but very little to make an appearance; but when a party is not named as a defendant in the record—not made a defendant in the bill or in the petition—it requires at least a full and explicit intent and voluntary appearance on the part of such person, before he can be held to have entered his appearance and become a party to the bill; because it is a waiver of a certain exemption and non-liability to suit. The courts have always held that that may be done.

The exemption from service of

process can be waived by a party, and he can voluntarily enter his appearance, and acquiesce in the jurisdiction of the court; but that must always be done voluntarily, and made with the consent and by the authority of the party whom the counsel proposes to represent.

In this case the appearance of Mr. Hyde is fully explained by the affidavit of Mr. Ream, vice-president of the Consolidated Street Railway Co., who says it was done in pursuance of the request of Mr. Barton Smith, who was the general counsel of the defendant company, but who did not claim to be specially advised or familiar with the practice in patent cases; and inasmuch as this litigation involved the consideration of the validity of patents, he asked his client to empower him to employ counsel of more experience in the practice in this class of litigation; and authority was given him to employ Mr. Hyde to appear as counsel for the Consolidated Street Railway Co. Therefore it is fairly and abundantly, and without any doubt of any kind, that Mr. Hyde's appearance in the case is fully explained, and by the most explicit authority, as counsel for the Consolidated Street Railway Co., and that alone.

I am not prepared to say, even admitting the fact that there was such a contract between the Thompson-Houston and General Electric Co. and Consolidated Street Railway Co., but that it would not be authorized to have its counsel appear here to make a defense as to the non-use and non-infringe-

ment of patents by reason of its having sold certain articles to the defendant. It is a familiar principle that the party in possession of land, where he holds it under a warranty, and suit is brought to dispossess him, may bring in the warrantor and make him defend the title. I am not sure that under a warranty and guaranty of title, and the right to use patented appliances, the vendor may not send his counsel in a case for infringement to make defense for and in behalf of the defendant.

It is true that, where a party is sued as agent of the vendor, and the vendor come in with his counsel and makes a defense, he does it not for the defendant himself who is sued, but independent of the agency, but becomes a party to the action. And that is the case relied upon in 41 *Fed. Rep.*, of *Eagle Manufacturing Co. vs Miller*. In that case the defendants were the agents of the Massillon Co. at the place where they were sued. They were sued as agents of the Massillon Co. The Massillon Co. were in fact defendants in the suit. They appeared there by counsel. Judge Shearer says in his opinion that "it appears from the record that the Massillon Co. appeared in the case by their counsel; they were the real defendants in the suit." But he declined to allow them to be made parties by supplemental bill, but ordered that the decree should recite the fact that the Massillon Co. appeared there by their counsel, and conducted the proceedings, and were therefore bound by the litiga-

tion, and by the result of the case. So that case is quite different from this case. In this case there is no one here authorized to represent the Thompson-Houston Co. as defendant in the case. On the contrary, the presumption which might arise from the appearance of their general counsel is rebutted by the positive affidavit of Mr. Ream that he is here in the employ of the Toledo Consolidated Street Railway Co., employed at the request of its general counsel for the reason named. We think the appearance of Mr. Hyde is fully and satisfactorily accounted for. He is not in the case as the representative of the Thompson-Houston Co. and the General Electrical Supply Co., but as the assistant counsel of the Toledo Consolidated Street Railway Co. So that upon both of these grounds it seems to me that the complainants are wholly unable to show any right to make these companies parties to the bill.

It is not claimed that they could be brought in here by process; they are non-resident corporations; and under the act of March 3, 1887, they could not be sued in this district, even if found in the district, being non-resident corporations.

The grounds of the motion proceeding entirely upon the theory that the Thompson-Houston Co. and General Electrical Supply Co. had already appeared in the case because of the contract, and because of the appearance of their general counsel, that being explained satisfactorily upon other grounds not inconsistent with that, the basis

upon which this motion proceeds must fail.

The motion is therefore overruled.

JUDGMENTS.

Motion to Vacate. Statutes of the State.

(In the Circuit Court, of the United States for the Northern District of Ohio, Western division. June term, 1894. Present, Hon. Augustus J. Ricks.)

(There is no statute of the United States and there is no authority conferred upon the Courts of the United States, to give relief from a judgment after the term in which it is granted. Such authority can neither be conferred upon nor withheld from the Courts of the United States by the Statutes of a state or the practice of its courts. ED. LEGAL NEWS.)

The Village of Celina vs The Eastport Savings Bank.

RICKS, J.

The Eastport Savings Bank instituted a suit at law in this court in June, 1890, against the village of Celina, and asked for judgment on certain past due coupons which are attached to certain bonds issued for the building of a railroad. The summons in that case was issued on the 7th of June, and was served on the mayor and the clerk of the village of Celina on the 12th of June, and the answer day was July 5, 1890. No answer was filed on the 5th day of July, 1890, no motion of any kind was interposed; and on the 2d of December, 1890, which was at a subsequent term, a judgment by default was entered against the village of Celina upon these unpaid coupons, and a final judgment entered for some thirty-three hundred and odd dollars. On the 2d day of September following—1891—nearly a year after the judgment was entered, the village authorities claimed that they were for the first time notified that

a judgment had been entered, and thereupon the following month—October 28, 1891—they filed a bill in equity asking to set aside this judgment by default, on the ground that it was rendered through inadvertence and mistake; and the inadvertence and mistake set forth is, that notwithstanding the fact that this process was regularly served upon the proper authorities of the village, and though it appears that the council of the village, within ten days after the service of process, passed a formal resolution authorizing the mayor to employ counsel; that on the 27th day of June, before the answer day, the mayor went to Marsh & Morey, counsel, in the village of Celina, and had a conference with them with reference to the condition of this action; yet, notwithstanding all this, no appearance was entered, and no answer was filed, and the judgment stood for nearly a year before this bill in equity was filed to set it aside. The agreed statement of facts is, that in pursuance of this ordinance of the city authorities, the mayor went to the office of Marsh & Morey, and stated to them fully the nature of the case that was pending, and asked them to defend it; and the statement of facts further agrees that Marsh & Morey accepted the retainer—that is, they understood that the mayor was there for the purpose of employing them; but they say they understood that some further conference was to be had before they were called upon to file their answer, and they took no affirmative action. They admit that they were retained, but

they took no affirmative action then, and no answer was filed to this suit, and no attempt was made to interpose any objection to it until nearly a year after, when this bill is filed and relief is prayed for.

This is not a sort of an inadvertence and mistake that courts of equity concede to be sufficient grounds to set aside a judgment by default. But whatever the rule in the state courts may be, where statutory relief is provided for in a great many cases, the Supreme Court of the United States, in 104 U. S., have made it absolutely impossible for this court to grant any relief in this case. Mr. Justice Miller, speaking for the Court, says:

"It is a profitless task to follow the research of counsel for the defendants in error through numerous decisions of the state courts cited by them on this point in support of the action of the Circuit Court. The cases from the New York courts, which go farthest in that direction, are largely founded on the statute of that state, and we are of opinion that on this point neither the statute of that state nor the decisions of its courts are binding on the courts of the United States held there.

The question relates to the power of the courts and not to the mode of procedure. It is whether there exists in the court the authority to set aside, vacate, and modify its final judgments after the term at which they were rendered; and this authority can neither be conferred upon nor withheld from the courts

of the United States by the statutes of a state or the practice of its courts."

Counsel in their brief rely upon some statutes of the state of Ohio which authorize relief upon proper application, by the state courts after the term at which judgment is entered; but there is no statute of the United States, there is no authority conferred upon the courts of the United States, to give any relief from a judgment after the term in which it is granted. If a motion is interposed during the term, and that motion is continued to a subsequent term, of course, that gives the court control of the judgment just the same as it would have at the term at which it was entered; but in the absence of that motion and that grant of power, the power of this court terminated finally and beyond all call at the end of that term, and as more than a term has intervened in this case, the court is powerless to grant relief.

The equity in this case is not as strong, of course, being only a judgment upon the unpaid coupons, as it would be had the judgment been upon the bonds themselves. These bonds have been declared unconstitutional by the Supreme Court of the United States, recently, affirming the Court of Appeals in a case tried here two or three terms ago. So the equity would be very strong, strong as it is; but inasmuch as the taxes have actually been collected and are in the treasury for the payment of these past due coupons, the hardship is not very great. Of course, if suit is brought on the bonds, there will be a complete defense in this decision, but the reasons assigned in support of this bill are not sufficient, and the bill will be dismissed.

U. S. District Court.

MARINE INSURANCE.

(In the District Court of the United States for the Northern District of Ohio, Western Division Present, Hon. Augustus J. Ricks.)

Samuel R. Callaway, Receiver, Libellant, vs Orient Insurance Company, Respondent. In Admiralty. Decision as to, exceptions to answer.

RICKS, J.

This is a libel filed by Mr. Callaway, as receiver of the Toledo, St. Louis and Kansas City Railroad Co. against the Orient Insurance Co. On the 1st day of April, 1893, libellant took out a policy of insurance covering all package freight and shipments on vessels operated by Mr. Callaway, as receiver, between the ports of Toledo and Buffalo. Said policy provided that no shipment should be insured except as were reported and approved, and endorsed upon the policy by the defendant. It is also averred that the provision that no shipment should be insured until approved and endorsed on the policy was substantially waived; that defendants furnished a book, and it was then agreed that all shipments entered into said book should be considered as endorsed on said policy, and the same should be approved, and premiums paid monthly thereafter.

On or about the 13th day of October, 1893, a large shipment of freight was made on the Dean Richmond, bound from the port of Toledo to the port of Buffalo. The value of said package freight so shipped amounted to \$42,781.61.

The libel also avers that there was entered on said book a freight list, being freight earned by libellant, to the amount of \$2,256.60; and freight charges advanced to the amount of \$317.51.

To this libel an answer was filed by the respondent, in the 16th article of which is a general averment equivalent to alleging the general issue in an action at law, averring that the respondent has not performed all the conditions set forth in the libel.

The chief question presented arises on the libellant's exception to the 12th article of respondent's answer; but respondent excepts to that part of the libel which avers on whose account the insurance is to be recovered; and that is intended, as counsel say, to call forth and to elicit the real party in interest, and to protect it against paying to a party not in interest, and is, or may be reserved, by consent of counsel, until the hearing, and at that time, in the decree, if any is rendered, a provision can be inserted as to the real parties in interest so as to protect the insurer.

The main question presented is raised on the libellant's exceptions to the 12th article of defendant's answer, which claims that the policy has been forfeited, because the libellant did not report all shipments for insurance to be accepted and endorsed.

The policy is a peculiar one, and it is difficult to determine exactly what it is. It may fairly be said to cover only shipments reported. There is a provision in the policy—

a specification—that "no shipment to be considered as insured until approved and endorsed hereon by this company." Insurance was therefore only effected on the shipments reported and entered in the books. This seems to have been the intent of the parties, and I do not see why such a contract is not permissible, and why it cannot be enforced. I do not think the contention of the counsel for respondent that this was a promissory warranty is sustained by the authorities. I think it is rather covered by the citation made by proctor for libellants from 1 Parsons on Marine Insurance.

"The whole purpose and intention of making such a policy would seem clearly to hold the insurers to this extent. As to all shipments subsequent to the policy, the bargain may be understood to be, on the part of the insurers, a promise to make future insurance, and that there were subsequently as many contracts of insurance as there were endorsements on the policy. This was indeed held in an interesting case arising under a policy of this kind. It would follow that the policy itself insured nothing, and was not even a contract to insure any shipment of the insured; and that the contract took effect on any shipment, only after all the requirements of the original policy were complied with; but that then it took effect by force of that policy."

I think this is a fair description of the character of this policy, and that it was clearly within the intent of the parties to make such a policy, and it is a fair construction of it.

The exception therefore, will be sustained, and the case will be set down for trial.

Brown & Geddes, Libellants Proctors:

Cary & Whitridge for Respondent.

Toledo Legal News.

OFFICIAL LAW JOURNAL OF LUCAS
COUNTY, OHIO.

In the matter of the designation of a daily Law Journal in Lucas County. As required by Sec. 1 of an Act passed April 14th, 1884, and amended Feb'y 25, 1886, entitled "An Act relating to the posting of court calendars and legal notices in certain counties," as amended May 9, 1894, the Judges of the Courts of Record in said County other than the Circuit Court, hereby jointly designate the TOLEDO LEGAL NEWS, a daily law journal published in said County, as the journal wherein until the farther order of said judges, shall be published all the notices, advertisements, abstracts and matters and things specified or referred to in said Section 1.

Approved { GILBERT HARMON,
REUBEN C. LEMMON,
ISAAC P. PUGSLEY,
Judges of Common Pleas.
I. I. MILLARD, Probate Judge.

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SATURDAY, JULY 14, 1894.

OHIO STATE BAR ASSOCIATION.

Fifth Annual Meeting at Beebe Hall, Put-in-Bay, Commencing July 18, 1894.

PROGRAM.

First Day, Wednesday, July 18, 1894.
2 O'clock P. M.

The meeting will be called to order by S. S. Wheeler, Esq., Chairman of the Executive Committee.

Welcome Address—Gov. Wm. McKinley.

Annual Address of the President—S. R. Harris, Esq.

Report of Committee on Admission and Election of Members.

Report of Secretary.

Report of Treasurer.

Report of Standing Committees, as follows:

1. Executive.

2. Judicial Administration and Legal Reform.

3. Legal Education.

4. Grievances.

5. Legal Biography.

President's call on Judicial Districts for the names of deceased members.

Memorials.

EVENING SESSION—SOCIAL.

Second Day, Thursday, July 19.

10 O'clock A. M.

Address, Subject: George W. Houk—Hon. John A. Shauck.

Reports of Special Committees:

New rooms for Supreme Court and State Law Library.

Selection of committee on Nomination of Officers.

AFTERNOON SESSION.

2 o'clock.

Report of Committee on Nomination and Election of Officers.

Report by Districts of Members of Standing Committees.

2:30 o'clock.

Address, "Constitutional Law,"—Hon. J. Randolph Tucker, of Virginia.

Appointment by President of Delegates to American Bar Association.

Recess for organization of Standing Committees.

Discussion of Reports of Standing Committees.

EVENING SESSION—BANQUET.

8 o'clock.

Third Day, Friday, July 20.

Discussion of Reports of Standing Committees (continued).

Miscellaneous Business.

The Executive Committee reserves the right to make such changes in the aforesaid program as may be deemed advisable.

Notes.

1. Attorneys attending the meeting should ask for the special Put-in-Bay excursion rates, which are lower than the special rates that are made for conventions.

2. Attention of members is invited to the Constitutional provision on dues.

3. The Executive Committee will meet at the Beebe House at 8 o'clock p. m., July 17. The Beebe House will be headquarters for the Association.

4. It is suggested that the other standing committees meet at the same place, at 10 o'clock a. m., July 18.

5. Members expecting to attend the banquet should notify the Secretary of their intention not later than Wednesday evening, July 18.

6. Members desiring to read papers at the meeting are requested to communicate immediately with S. S. Wheeler, Esq., Chairman of the Executive Committee, at Lima.

By order of the Executive Committee,
S. S. WHEELER, Chairman.

FREDERICK C. BRYAN,
Secretary pro tem., Akron.

OHIO PROSECUTING ATTORNEY'S ASSOCIATION.

Ninth Annual Meeting to be Held at Beebe Hall, Beebe House, Put-in-Bay Island.

PROGRAM.

First Session, Tuesday, July 17, 1894.
1:30 O'clock P. M.

Meeting will be called to order by the the President.

Call of roll of members.

Report of proceedings of Eighth Annual Meeting.

President's address, "The Prosecuting Attorney,"—Hon. Chas. Stewart, of Springfield, O.

Address, "Some Problems in Criminal Jurisprudence,"—J. A. Barber, of Toledo, Ohio.

Address, "Our Duties Toward Each Other,"—S. V. Hartman, of Greenville, Ohio.

Discussions—The following topics will be discussed by the members. All are invited and expected to take part:

"Recent Legislation,"—Discussion opened by Paul Cooke, of Chillicothe, O.

"Needed Legislation,"—Discussion opened by Wm. R. Pomerene, of Coshocton, O.

EVENING SESSION—SOCIAL.

Second Day, Wednesday, July 18, 1894.
9 O'clock A. M.

Business Session.

Report of Secretary.

Report of Treasurer.

Report of Judicial Committee.

Report of Executive Committee.

Election of Officers.

Appointment of Committees

Adjournment.

Notes.

Arrangements have been made for special rates for transportation and accommodation. Persons attending the meeting should ask ticket agent for "Special Put-in-Bay Excursion Rates."

Beebe House makes the following rates to members: \$2.00 per day two in bed, or \$2.50 per day single.

Members desiring to read papers at the meeting are requested to communicate with the executive committee.

Executive Committee:

WM. R. POMERENE, CH.,
Coshocton, O.

C. C. WILLIAMS,
Columbus, O.

H. A. MYKRANTZ, SEC.,
Ashland, O.

RECENT CASES.

Men called to the various departments in the administration of justice, or governmental functions, are presumed to appreciate the gravity and importance of duties before them without an element of inflammatory advice from courts. This principle is very wisely upheld by the Supreme Court of Nebraska in a decision reported in 59 N. W. R. 118. A portion of the official syllabus of which is as follows;

"4 The existence of facts which will warrant the finding of an indictment is a question for the grand jury, and should not, as a rule, be assumed by the judge.

"5 A charge to the grand jury which, after assuming that the crime of bribery had been committed, and that it was the duty of the jurors to indict therefor concluded as follows: 'There comes up from the people a command for a forward march all along the line of your duty. You should give heed to that cry, for it comes from a patient and long suffering endurance which has at last reached its limit.' Held, that the term 'inflammatory,' as applied to said charge, is a merited criticism."

A note payable "on demand, after three months notice," was held by the Supreme Court of New York, general term, to be barred by the Statute of Limitations when the notice was not given until about eleven years after the note was executed.

The Court, Barrett, J., held that the expression "on demand," was not so qualified by the words "after three months notice," as to take the contract out of the general rules with regard to demand notes. Among cases cited in the opinion published in N. Y. Law J. Vol. 11, No. 77, is *Palmer vs Palmer* 36 Mich., 490, in which it was said: "If there was any infirmity in the consideration, or any defect in the binding character of the obligation, he might retain it until all testimony was lost and defeat the defense. This is the mischief which the Statute of Limitations was intended to remedy."

The Supreme Court of Michigan, in a recent case, severely rebukes an attorney who included in his bill of exceptions charges that the trial judge acted unfairly, maliciously and dishonestly in favor of a railroad company. Concluding the Court said:

"Such attacks in court records upon honorable members of the profession are without the pale of professional ethics, and as such we feel that we owe it to the judiciary, and the profession, to set the seal of our disapproval upon it."

A promise of marriage conditioned on resulting pregnancy is held by the Supreme Court of Oregon, in *State vs Adams*, 22 L. R. A. 840, not to be such a promise of marriage as will bring the case within a statute as to seduction accomplished on promise of marriage. The court says it has found but one case on the question, and that was decided by the Supreme Court of New York, in *People vs Hustis*, 32 Hun, 58, to the contrary effect, but the Oregon court is unwilling to follow that decision.

The New York Court of Appeals, in *Hankins vs The N. Y. L. E. & Westn. R. R. Co.*, reported in Vol. 11, 84 New York Law Journal, has held that the train dispatcher of a division, who, in directing the movements of two trains which are being run entirely on special orders, makes a mistake whereby the trains collide, is a vice-principal as to a fireman on the engine of one of them, who is injured thereby. Opinion by Peckham, J.

The Hamilton County Circuit Court, in *Village of Norwood vs Catherine Wooley*, reported in The Index July 9th, has held that the amendment of section 2260 R. S. (April 20th, 1893), providing for the retaxing of costs where a corporation fails to take condemned property, does not apply to pending actions.

The Toledo Legal News,

\$3.00 PER YEAR,

In Advance.

U. S. Circuit Court.

Northern District of Ohio--Western Division.

Filings.

1218—Leavens et al vs Bronson et al. Receiver's bond. H. B. Harris and James B. Woods sureties. Parks & Parks, attys.

1223—McDonald vs The Tol Con St Ry. and the City of Tol. Demurrer of the City of Tol to plaintiff's amended petn. C. F. Watts, City Solr.

1028—Village of Celina vs Eastport Sav Bk. Bond on appeal.

1163—Craig vs L E & W R R. Verdict set aside, new trial granted. To be reported.

1222—John J. McDonald et al vs Gilliland. Reply. Saltzgeber and Marble, Van Wert, O.

Continental Tr Co. vs T St L & K C Ry Co. Report of recr Calloway for June 1894 Receipts \$181,133 41, disbursements current, \$165,705.

1205—Continental Trust Co. vs T St L & K C R R. Order restraining all persons from interfering in any manner with cars, switches, etc., etc., and with employees of deft Co.

1182—Farmers Loan & Trust Co. vs T A A & N M Ry Co. Motion of Joseph France for leave to sue Receiver in C P Court, Lucas Co., O. F. E. Wright, atty.

1120—Joseph A. Beauvais, Tr. vs The Electric Ry & Power Co. Cross bill deft Ry Co, filed. Doyle, Scott & Lewis, atty.

1058—Daniel M. Kennedy vs Solar Refining Co. et al. Stipulation continuing hearing etc. C. E. McDonald, John H. Doyle, Solrs.

556—The Aetna Life Ins Co. vs Pleasant twp, Van Wert Co. Mandate from C. C. of appeals.

1193—Wm C. Niblack vs S. W. Reed, assignee. Replication to amended ans. Scribner & Hurd, attys.

1193—Same vs same. Answer to cross bill. Same attys.

1205—Continental Tr Co. vs T St L & K C Ry. Praeipce for subpoena for witnesses before master for intervenor, Catharine M. Ragan, admx. Hurd, Brumback & Thatcher, attys.

ATTORNEYS.

(Court of Common Pleas of Lucas County, Ohio. April Term, 1894.)

35298—Katharine Villhauer admx
vs The City of Toledo.

1. The authority of an attorney is terminated by the death of his client unless such authority is coupled with an interest.

2. A contract between a client and his attorney that the attorney shall receive as compensation for his services a certain percentage upon the sum recovered does not create such an interest as will prevent the death of the client from operating as a revocation of the attorney's authority.

3. An attorney was employed to collect a claim against the City under a contract that he was to have for his services one-half of the sum recovered. After the recovery of a judgment the client died and thereafter the City paid the judgment to a third person upon the order of the attorney. No part of the amount paid was received by the administrator of the client and the acts of the attorney were not ratified by the administrator. HELD, that such payment of the judgment was unauthorized and the administrator may maintain an action against the City on the judgment.

PUGSLEY, J.

This is a motion for a new trial. The action is upon a judgment and the defense is payment. At the conclusion of the testimony the court directed a verdict for the defendant, with the understanding that the questions of law involved might be presented upon a motion for a new trial, when they could be more fully examined and considered.

The undisputed facts are these: Upon the 7th of December, 1885, one John Villhauer recovered a judgment in this court against the defendant for the sum of \$531.31. That judgment was based upon a claim for the balance due (and interest) upon an award of damages theretofore made in favor of Villhauer, by reason of the change of grade of a street. Upon the 4th of October, 1889, Villhauer died. At the time of his death proceedings in error were pending in the Supreme Court to reverse this judgment, and

in April, 1890, the judgment was affirmed. Dodge & Raymond, a firm of attorneys composed of Charles Dodge and E. P. Raymond, were the attorneys of record for Villhauer, and acted for him in the prosecution of the case and obtaining judgment. In June, 1890, Dodge & Raymond in writing authorized the Sinking Fund Trustees of the City of Toledo to pay the amount of this judgment to Paul Raymond. Such payment was made, and the trustees took a receipt for the same from E. P. Raymond. The receipt was signed "John Villhauer, per E. P. Raymond, attorney," and was recorded upon the appearance docket of that case. In March, 1891, the plaintiff was appointed administratrix of the estate of John Villhauer, and in October, 1893, she brought this action to recover from the city the amount of this judgment and interest. The death of Villhauer was known to both the attorneys and the city, at least there is no evidence that it was unknown.

It is claimed by the plaintiff, first, that the death of John Villhauer terminated the authority of Dodge & Raymond to act as attorneys in the case, and that any payment thereafter made by the defendant to Dodge & Raymond was unauthorized and would not bind the plaintiff; and second, that the payment made by the defendant to Paul Raymond was without authority, and did not discharge the judgment.

It is well settled that the authority of an agent is instantly terminated by the death of the princi-

pal, unless such authority is coupled with an interest in the subject matter of the agency. And this rule applies to the relation of attorney and client. The first question, therefore, to be decided, is, whether the authority of Dodge & Raymond as attorneys for Villhauer was coupled with an interest. I will read from the record in this case one question and answer in the testimony of E. P. Raymond:

Q. What if any contract did you have with Mr. Villhauer in respect to that case? A. I made arrangements with him personally, that in case I recovered I was to have one-half for the service, I was to take my chances upon a recovery; if there was no recovery, I was to have nothing.

This is all the testimony in the record as to the nature or the terms of the employment of Dodge & Raymond. They were employed in the ordinary way to prosecute and collect Villhauer's claim against the city, with the agreement that as compensation for their services they should have one-half of the amount recovered.

The question as to the nature of the interest which will prevent the death of the principal from operating as a revocation of the power of the agent has been considered in numerous cases. The case of *Hunt vs Rousmanier*, 8 *Wheat*, 174 is a leading case, and one that is always referred to in the discussion of this question. Chief Justice Marshall, in delivering the opinion of the Court, says: (I will read from Mechem on Agency, Sec. 242.)

"This general rule, that a power ceases with the life of a person giving it, admits of one exception. If a power be coupled with an 'interest' it survives the person giving it and may be executed after his death. As this proposition is laid down

in the books too positively to be controverted, it becomes necessary to inquire what is meant by the expression 'a power coupled with an interest?' Is it an interest in the subject on which the power is to be exercised, or is it an interest in that which is produced by the exercise of the power? We hold it to be clear that the interest which can protect a power after the death of a person who creates it, must be an interest in the thing itself. In other words, the power must be engrafted on an estate in the thing.

The words themselves would seem to import this meaning. 'A power coupled with an interest' is a power which accompanies or is connected with an interest. The power and interest are united in the same person. But if we are to understand by the word 'interest' an interest in that which is to be produced by the exercise of the power, then they are never united. The power to produce the interest must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and therefore cannot, in accurate law language, be said to be 'coupled' with it.

But the substantial basis of the opinion of the court on this point is found in the legal reason of the principle. The interest or title in the thing being vested in the person who gives the power, remains in him, unless it be conveyed with the power, and can pass out of him only by a regular act in his own name. The act of the substitute, therefore, which in such a case is the act of the principal, to be legally effectual, must be in his name, and must be such an act as the principal himself would be capable of performing, and which would be valid if performed by him. Such a power necessarily ceases with the life of the person making it. But if the interest or estate passes with the power, and vests in the person by whom the power is to be exercised, such person acts in his own name. He is no longer a substitute acting in the place and name of another, but he is a principal acting in his own name in pursuance of powers which limit his estate. The legal reason which limits the power to the life of the person giving it, exists no longer; and the rule ceases with the reason on which it is founded."

There is also a reference by the author in this same section to another case, where the Judge says:

"A power is simply collateral and without interest, or a naked power, when to a mere stranger, authority is given to dispose of an interest in which he had not before, nor has by the instrument creat-

ing the power, any estate whatsoever; but when the power is given to a person who derives under the instrument creating the power or otherwise, a present or future interest in the property, the subject on which the power is to act, it is then a power coupled with an interest."

I have a reference also to some other cases. In the case of *Houghtaling vs Marvin*, 7 Barbour 412, it is said that—

"The interest which will authorize the execution of the power after the death of the principal, must be an interest in the thing itself which is the subject of the power, and not in the proceeds or avails of such thing. If there is merely a power to a creditor to receive a debt, expressly for the purpose of liquidating the claim of the creditor, unaccompanied by an actual assignment of the debt or by any security to which the power might have been ancillary, it is revoked by the death of the principal."

In the case of *Easton vs Ellis & Morton*, 1 Handy 71, one B. G. Easton had money on deposit with Ellis & Morton, who were bankers. In writing he authorized these bankers to pay all checks which were drawn upon them by one E. Easton. After the death of B. G. Easton, Ellis & Morton paid some checks which had been drawn by E. Easton, they at the time having no knowledge of the death. This action was brought by the administratrix of B. G. Easton against Ellis & Morton to recover the amount of these checks which were so paid. I refer to this case simply for the purpose of reading briefly from the opinion of Judge Gholson (page 76).

"In the present case, the money on deposit with Ellis & Morton, unquestionably, at the time the authority was given, the individual property of B. G. Easton, must be considered the thing which was the subject of the power. It is clear to my mind that no interest in that money passed to E. Easton. It may be that, by the exercise of the power, he would have

derived a benefit under the business arrangements existing between him and B. G. Easton. The exercise of the power might have brought the money of B. G. Easton as capital into the business, in the profits of which, under the articles of agreement shown in evidence, E. Easton was entitled to share; but there was nothing in the transaction to transfer to E. Easton an interest in the money. He could only act, in reference to it, as the agent of B. G. Easton.

It is therefore my conclusion that this case has not been brought within the only exception I feel authorized to admit to the general rule that the authority of the agent ceases at the death of the principal. I believe that the defendants in the case had no knowledge of the death of the principal, and acted with entire good faith. The general rule of law to be applied in this case may, therefore, operate hardly, as other general rules not unfrequently do; but courts are not authorized to engraft exceptions, to meet the hardships of particular cases."

In the case of *Hartley's Appeal*, 53 Pa. St. 212, it is held that—

"A power of attorney to collect moneys etc. for the principal, the attorneys to receive as compensation 'one-half of the net proceeds,' is not a power coupled with an interest, and is revocable. In the absence of an express stipulation, to make a power of attorney irrevocable, there must co-exist with the power an interest in the thing to be disposed of or managed."

In the case of *Flanagan vs Brown*, 70 Cal. 254, it is held that—

"When the owner of a promissory note delivers it endorsed in blank to another, with power to manage, transfer, or dispose of it, under an agreement whereby its proceeds are to be equally divided between them, the transferee is a mere agent for collection, and a release of the note subsequently executed by the owner to the maker is a defense to an action against him by the agent. In such a case, the power of the agent is not coupled with an interest."

The Court say:

"A power coupled with an interest is where the grantee has an interest in the estate as well as in the exercise of the power. It is determined to exist or not, accordingly as the agent is found to have such estate or not before the execution of the power. If his interest is only a right to share the proceeds which result

from the execution of the power, the agent has not a power coupled with an interest."

In the case of *Coney vs Sanders*, 28 Ga. 511, it is held that—

"In order that a power may be a power coupled with an interest, the agent must have an interest in that to which the power relates, and it is not enough that he pays a valuable consideration for the power."

Now, applying the principles of these decisions to the case at bar, I am of the opinion that the authority of Dodge & Raymond as attorneys for Villhauer, was not coupled with an interest. No interest was assigned to them, either in the claim which they were employed to prosecute or in the judgment that was recovered; and the contract of employment being simply a stipulation as to the compensation which they should receive for their services, cannot be regarded as amounting to an equitable assignment either of the claim or of the judgment. Their compensation was not payable upon the simple recovery of the judgment, but only when the judgment or some part of it should be paid, and their interest was only in the proceeds or avails of the judgment; and if they collected the judgment, these proceeds or avails could only be realized through the exercise by them of their authority as attorneys. Dodge & Raymond could not act in their own names in collecting the judgment or in discharging the judgment. They could only act as attorneys for Villhauer during his life, or as attorneys for his legal representative after his death. They had no interest which they

could assert in their own names and the release of this judgment which was given by E. P. Raymond as attorney for John Villhauer, or in the name of John Villhauer, he being dead, was not a valid or proper release.

It does not follow, however, from this holding that the contract which Dodge & Raymond had with Villhauer as to their compensation was revoked or annulled by his death. It is held in certain cases that where by contract the fee of the attorney is contingent upon the amount recovered the client may at any time, without cause, discharge him and revoke his agency, subject to the right of the attorney to recover his compensation, as if his contract of employment was fully performed. It is said in these cases that such a contract is to be construed as fixing the mode of compensation only. I refer to the cases of *Kersey vs Garlton*, 77 Mo. 645; *Ronald vs Mutual Association*, 30 Fed. Rep. 228; *Tenney vs Berger*, 93 N. Y. 529. The same rule laid down in these cases it seems to me, will apply when the agency is revoked by the death of the principal. His power to act as agent ceases, but his right to compensation for his services, with such protection as the law secures to him, still exists, and may be enforced.

In Ohio an attorney has no lien as such for his services upon a judgment which he has obtained for his client, in the absence of any contract giving him such lien. The rule is thus stated in the case of *Diehl vs Friester*, 37 O. S. 477:

"Although an attorney may contribute his skill and services in obtaining a judgment for his client, he has, in this state, no lien on such judgment for his fees, where there is no agreement for such lien known to the judgment debtor, in the sense that such judgment debtor may not effectually satisfy such judgment by payment of the amount thereof to the judgment creditor; nor do we doubt the right of parties to compromise any pending suit, in opposition to the wish of their attorneys. But, on the other hand, an attorney may have a claim upon the fruits of a judgment or decree which he has assisted in obtaining, or upon a sum of money which he has collected, and under some circumstances courts will aid him in securing or maintaining such a claim. Thus he will be protected in retaining his fee out of money which he has collected for his client. He will be protected in his claim as attorney on the funds in the hands of a receiver, or in court. This protection, it will be seen from the cases cited, will be afforded in many other cases."

The fact that the compensation of the attorney depends upon the amount of the recovery, or is to be a certain percentage of the recovery, does not give him any greater rights than where the amount of the compensation or the method of compensation is not agreed upon. In either case he has no estate or interest in the subject matter of the agency. His interest where there was such a contract as this, is only a right to share in the proceeds which result from the execution of his authority. It is, therefore, not an agency coupled with an interest.

For these reasons, my opinion is that Dodge & Raymond had no authority to collect the judgment, and that payment to them is not an absolute defense to this action, the plaintiff not having received the money, or any of it, and not having ratified the acts of Dodge & Raymond as attorneys. It is therefore

unnecessary to consider the second claim of the plaintiff.

I will add this; it seems to me now, from the proof in this record, that the defendant, the city, in an action upon the judgment would be entitled to credit on that judgment for the share of the amount collected which, under the contract of employment, Dodge & Raymond were to receive for their services. The whole judgment was paid by the city to Paul Raymond upon the order of Dodge & Raymond. That, of course, includes the share in the judgment of Dodge & Raymond. They would be estopped, both as against the plaintiff and the defendant, from denying that they received their share of the amount collected. Under the circumstances, it seems to me equitable and just that the plaintiff should not be permitted to recover of the defendant more than her share of the judgment, the share of Dodge & Raymond having been paid and satisfied by the defendant.

The verdict in this case will therefore be set aside and a new trial granted.

King & Tracy, for plaintiff.

C. F. Watts, City Solr. for defendant.

The personal liability of highway officers is a question of importance which is examined at great length in a note to *Bates vs Horner*, 22 L. R. A. 824, in which trustees were held not liable for the frightening of a horse by operation of a stone crusher in the highway.

ORDINARY PRUDENCE.

An Employer Has a Right to Presume That Skilled Mechanics Will Perform Their Work in a Safe and Proper Manner.

(Lucas County Common Pleas Court. April Term 1904.)

Warner vs The National Malleable Castings Co. Motion to set aside verdict for plaintiff.

(An owner or employer is exercising ordinary care and prudence if he directs persons holding themselves out to be carpenters of ordinary skill to erect a building according to certain plans, known to the workmen, out of materials upon the ground, having no defects that could not clearly be seen and of dimensions well known to the mechanics.)

HARMON, J.

The plaintiff claimed that he was set to work by the defendant upon a frame structure which was insecure and unsafe and dangerous; that while so at work the structure fell and he was injured.

He also claimed that the lumber furnished was of insufficient length to build such a structure as he was directed to build.

The evidence showed that the structure consisted of certain upright posts connected by horizontal beams, laid crosswise, and that plaintiff was set to work to construct a plate lengthwise on top of the uprights. This was to be made of 2 x 4 timber pieces. 14 feet in length, to be laid flatwise and spiked together, breaking joints; none of the timber to be cut and the joints to come where they would.

The distance between the uprights was about sixteen feet.

Plaintiff and a fellow workman

proceeded with the work, spiking the 2 x 4 pieces together and upon the tops of the uprights. The evidence showed that they were approaching each other from different directions between two of the uprights, spiking together the pieces to form the plate, when, in some way, the pieces they were spiking together parted and they were thrown to the ground and plaintiff was severely injured.

The defendants' foreman, the evidence showed, had directed plaintiff and his fellow workman to perform the work with the lumber, merely saying, "cut nothing; spike the 2 x 4 pieces together flatwise, breaking joints, let them come where they will, and hurry the work." The foreman then went away and left them to do the work in their own way.

Held, that an owner would be exercising ordinary prudence and care if he directed persons holding themselves out to be carpenters of ordinary skill, to erect a building according to certain plans, known to the workmen, out of material upon the ground, having no defects that could not clearly be seen and of dimensions well known to the mechanics using the material.

Held also, in the case at bar, that there was no evidence tending to show that plaintiff was injured by the defendants' negligence.

Motion granted.

A. W. & E. H. Eckert, for plaintiff.

Baker, Smith & Baker, for defendant.

Hamilton County Common Pleas Court.

The holder of a perpetual lease with privilege of purchase is an owner within the meaning of the street assessment statutes.

Boundaries of lots are to be determined for the purpose of assessment by use or occupancy, and not by imaginary lines on a plat.

97817—Frank T. Clements vs the Village of Norwood.

HOLLISTER, J.

Lot No. 9, Hopkins' subdivision in the Village of Norwood, fronted on Sherman avenue a distance of 50 feet, and on Station avenue 116.33 feet, forming the northeast corner of those streets.

In October, 1891, the owner of the lot sold to plaintiff the 30 feet thereof next east of Station avenue, making a lot 30 feet in front on Sherman by 116.33 on Station. In that year plaintiff erected a house on his lot in such a way as to indicate that it was intended to, and it did, front toward Sherman avenue. The east side of the house was 2 feet west of the east line of the 30 foot lot, and on the east line plaintiff's grantor built a wire fence.

In May, 1892, the owner of the 20 remaining feet of the lot leased the 20 feet to plaintiff, perpetually, with privilege of purchase within a certain time. The privilege has not been exercised and its time limitation has not elapsed. In 1894, plaintiff constructed a house on the 20 feet which he now occupies as a residence, and he rents the house on the other 30 feet to another.

On October 5, 1891, the village council passed a resolution to "improve Station avenue," and the ordinance to improve was passed

October 3, 1892. The ordinance to assess was passed July 21, 1893.

It is conceded by the defendant that under recent decisions of the Supreme Court in the Haviland and Sandrock cases, so-called, the assessment for the improvement of Station avenue should not be on the front feet abutting on that avenue, but should be against the lot as per the front feet on Sherman avenue. The plaintiff claims that the lot liable to assessment fronts but 30 feet on that avenue while the defendant contends that the entire 50 feet of the lot as platted should bear their respective proportional assessment.

The plaintiff can not escape the claim that, for purposes of assessment, he is the owner of the 20 foot lot of which he is the lessee perpetually with privilege of purchase. Says the Supreme Court on this subject, *Davis vs Cincinnati*, 36 O. S., 24, 26: "The owner referred to in section 626 must, as a general rule, be one having a freehold estate in the premises assessed. Perhaps exceptions to the rule exist. See Revised Statutes, sections 2733, 4181. The term 'owner' does not, as a general rule, include the holders of chattels real. The assessment is on land, and it is an owner of land who is liable to the personal judgment. We are clear that the term 'owner' does not include one having no other interest than as lessee for a term of years. Any other construction would lead to absurd consequences. A tenant holding for a month might be personally bound for permanent pub-

lic improvements of the most expensive character."

Section 4181 provides that "permanent leasehold estates, renewable for —, shall be subject to the same law of descent as estates in fee are subject." * * *

The degree of permanency given to such estates by the acts of the parties, common use, and statutory enactment have invested them with the essential attributes of a fee simple, and the argument of the court in *Davis vs Cincinnati*, applied to a ten year lease, a mere chattel interest, shows conclusively that it was the want of permanency and durability in that estate, which was the reason for that decision. Conversely the owner of a perpetual leasehold with privilege of purchase would be such an owner as must respond under the laws of assessment.

The ordinance to improve the street was passed in October, 1892, and plaintiff became the lessee of the 20 foot lot in the May preceding. The rights of the parties are fixed at the time of the passing of the ordinance to make the improvement: "Such ordinance is the resultant of those proceedings, (referring to certain necessary preliminaries) and evidences the final determination of the property owners through their public agents, to assume whatever burdens may be entailed upon them by the law in force when the improvement ordinance is passed." *Cincinnati vs Seasingood*, 46 O. S., 296, 301.

The plaintiff then was, for the purpose of this case, the owner of

the entire lot No. 9, but it does not follow that his entire property became subject to this assessment.

The mere fact that the original corner lot had a frontage of 50 feet on the plat as recorded, could not prevent its owner from dividing the lot as best pleased himself. If the plaintiff's grantor had, after conveying the 30 feet to plaintiff, retained the other 20 feet himself, it could scarcely be successfully maintained that his 20 feet should be assessed with plaintiff's 30 for this improvement. Imaginary lines are not the necessary demarkations of a lot, as the lines may appear on recorded plats. The use to which the property is put, and the nature of its occupation, are the tests to which the question of what is the lot should be referred. The Superior Court in General Term in the case of *Gibson vs Cincinnati*, 27 Bull., 80, 83, say: "It has long been established in assessment cases, that lots may exist without being a part of any numbered and recorded subdivision, and without appearing on any plat," and the court refer to a decision by Harmon, J., in *Matthews vs Cincinnati*, 16 Bull., 249, as laying down the rule, "that lots are to be determined by use and occupation in preference to imaginary lines and numbers by which they may be designated in a recorded subdivision." See, also, *Springer vs Avondale*, 350 O. S., 620, 625.

The plaintiff became the owner by deed of a corner lot 30 by 116 feet, and improved it by constructing a building appropriate to the

size and situation of his lot. This became the corner lot subject to assessment for the improvement of Station avenue, and it can make no difference, for purposes of assessment, whether his lessor for the next 20 feet had retained that property himself or had conveyed it by a separate conveyance to the plaintiff at a later time. The plaintiff used and improved the 20-foot lot in a manner appropriate to its size, situation, and occupies it as premises entirely separate and distinct from the other. He has two lots, not one. But defendant claims that plaintiff can not recover, because he has not tendered the amount due on the 30 feet, and bases the claim on section 5851 Rev. Stat., which provides: "If the plaintiff in an action to enjoin the collection of taxes or assessments admit a part thereof to have been legally levied, he must pay or tender the same admitted to be due." * * * And defendant cites *Frazier vs Seibern*, 16 O. S., 615, to the effect that one seeking to enjoin the collection of an illegal portion of a tax must first pay that which is legally assessed. This is the law, but the plaintiff cannot pay unless he knows how much he should pay. The Circuit Court, *Ehni vs Columbus*, 3 C. C., 493, holds that, "when the valid portion of an assessment can be ascertained, a court of equity will enjoin the collection of the illegal portion only, upon the condition that the valid portion be paid." Now, it appears that the defendant itself is so far at sea on the subject of what is the proper assessment to be levied

for the improvement of Station avenue, that it has appointed, or is about to appoint a commission, a part of whose duty shall be to determine that question. Under these circumstances how can the plaintiff ascertain what amount is properly chargeable against his thirty feet?

Decree for plaintiff.

Wilby & Wald for plaintiff.

W. E. Bundy for the Village.—
(Court Index, Cin.)

ALL KINDS OF . . .

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CONSTRUCTION OF WILL.

A Devise of Real Estate. Intention of Testator.

(Huron County Circuit Court, April Term, 1894. Present: Hons. C. S. Bentley, P. J., C. H. Scribner and G. R. Haynes, J. J.)

Jacob Hammel vs Thos. W. Palmer et al.

(H. for many years owned a certain tract of land in Monroeville, known as lot 122 which prior to his death was divided by the opening and extension of a street. It occupied the portion of the lot on one side of the street for warehouse purposes and the other was occupied by his servant, H. who received a certain sum in wages and the use of that portion of the lot without rental. H. in his will, devised to H "the lot known as number — in Monroeville, Ohio, on which the said H now resides." H. died, that under said will H took only that portion of the lot lying on one side of the street, which he had actually occupied. **ED. LEGAL NEWS.**)

BENTLEY, J.

The case of Jacob Hammel vs Thomas W. Palmer and others, is a case that comes into this court upon appeal from the Court of Common Pleas. Both parties claim the legal title and possession of a certain piece of real estate in Monroeville, Ohio, and the form which the action has now assumed is that each party asks that the title and possession in the real estate in question may be quieted as against the other, it being agreed by the parties that whichever party to this controversy may be found to be legally entitled to the real estate, shall be deemed in possession, sufficient for the purpose of granting a decree to quiet his title.

The question presented relates to the construction of a portion of the will of Henry M. Roby deceased which was duly made, and after the death of Mr. Roby in 1890, was duly admitted to probate.

The contention arises for the most part, under the third paragraph of the will which reads as follows: "I give and devise to

Jacob Hammel the lot known as number —, in Monroeville, Ohio, on which the said Hammel now resides."

Mr. Hammel contends that the property in question in this action was devised to him under that clause of the will.

On the other hand, the defendants claim that it was not so devised, that is, that it was not included in the description in this third paragraph of the will.

The facts bearing upon this matter may be briefly recited as these:

Henry M. Roby for many years owned a certain parcel of real estate in Monroeville lying to the north of Monroe street, the southern boundary of that parcel being Monroe street. On the north of this parcel of real estate, was another parcel belonging to other parties and which has been platted as an addition to the town of Monroeville. In that addition and dedicated as a part of it, was a street called Prospect street which came down in a southerly direction to the north line of the parcel of real estate here in question belonging to Henry M. Roby. This platting of the parcel of land north of the one here in question occurred many years ago, I think prior to the year 1893. After the platting and somewhere from the year 1873 to 1875,—the particular year is of no importance,—Prospect street thus dedicated down to the north boundary of the parcel here in question, was extended, in effect at least, and opened out to Monroe street through the parcel here in question. That threw a small portion of the parcel here in question which is called lot

121, to the west of Prospect street thus extended. On this portion of the lot designated generally as lot 121, the plaintiff in this action. resided for many years. He was in the employ of Henry M. Roby as a man of all work, a laborer who did whatever work was designated by Mr. Roby in his life time. There was a house upon this westerly portion of lot 121, west of Prospect street, in which Mr. Hammel was by Mr. Roby allowed to live without paying any rent. Mr. Hammel says that he received so much in wages from Mr. Roby and the rent of this ground free.

Many years ago, in 1873 or 1874, when Prospect street was thus in fact opened out southerly to Monroe street, and through lot 121, a fence had to be moved westerly so that it became the eastern boundary of the parcel of land on which Mr. Hammel lived, and the western boundary of Prospect street thus extended. To the knowledge of Mr. Roby, this street was improved at various times, and, partially, by his own direction. Trees were set out within the boundary of the street, as is usual along a line of street for shade trees, and walks were constructed on each side of the street and ditches made in throwing up the center of the street for travel in the highway; and the village itself, by action of its counsel, caused this so-called extension of Prospect street to be improved from time to time, and to all outward appearances, for many years before the death of Mr. Roby, it was a public highway of the village, although it was never formally, in writing, dedicated by Mr. Roby to

the public use; but it became used in this way for travel, for many years before Mr. Roby's death. This lot 121 was divided by this street and the improvements upon the street, by a fence on the side of the street, into two parcels, one of which was this land upon which Mr. Hammel resided, and the other part, east of Prospect street thus extended, was in the possession of Mr. Roby at the time of his death, and upon it was quite a large warehouse covering quite an extent of ground, and in which was the office of Mr. Roby, and in which he spent a large part of his time up to the time of his last sickness, in 1890. Mr. Roby resided in another part of town, and his usual way of going from this building upon the eastern part of lot 121 to his house, took him past the residence of Mr. Hammel and along past the portion of Prospect street thus extended through the so-called lot 121. That was the actual situation at the time this will was made, and at the time Mr. Roby died.

It does not appear that in any original platting of the town this parcel of land was designated as lot 121. A map of the village was introduced in evidence showing this parcel as designated by this number, 121, and it was shown that the plat by which it originally got this designation was a plat made for the purposes of taxation and perhaps under the direction of the county auditor or recorder. It was recorded as a plat in the records of the county.

It was testified that the reason this plat was made was because there were many lots in this village,

some of them designated under certain numbers in the original plat and other lots designated by similar numbers in the several additions to the town, and there might arise some confusion and so, for the purpose of taxation, and in order to obviate that difficulty, this general plat was made upon which this parcel became lot 121. Mr. Hammel, prior to the death of Mr. Roby, never had possession of the eastern portion of this lot 121, but he did have possession of this western portion where he resided. Under circumstances of that kind, it is claimed that by force of the terms of this third clause in the will, the whole of lot 121 passed to Mr. Hammel. The plaintiff makes that claim and the other parties claim that, under the terms of the will, and under the circumstances of the case, the will should be construed as only devising to Mr. Hammel that portion west of Prospect street upon which he resided.

There is no particular controversy among the counsel as to the general rules of law upon the subject of the construction of wills, namely: That the court should ascertain by the terms of the will, and by the circumstances surrounding the testator at the time he makes it, what his intentions in fact were in using the terms that he did in fact use.

Strictly and legally speaking, when we speak of a certain designated lot in a village by number, and there is that numbered lot and only one lot so designated, one number of that figure, the land included in the platting of the lot should be held to have been intended. It may be, of course, that the mere terms, a certain lot number 121, we will say, in a village, may or may not designate one certain defined parcel of land within the bounds of the village. There may be several lots, or more than one, bearing this same number. There

may be a lot of that number in the original plat and there may be a lot of the same number in one or more additions to the original plat and all within the designated village; or, there may be but one lot of that one number. The term lot, as is well known, is used very frequently with other designations, as simply indicating a parcel of land. Defined it may be by dedication, or it may be by the existence of boundaries such as fences, or it may be by other means pointed out and designated. This will says that the lot known as number [blank] in Monroeville, Ohio, on which Mr. Hammel resides, is devised to him, the number not being inserted.

It does not appear that the westerly portion upon which he resided was designated in any plat as any particular number neither does it appear that the westerly portion was designated by any particular number originally; but the whole parcel simply bears in this plat that I have mentioned, the assessor's plat, the number "121."

We have looked at this will and considered the circumstances and the authorities cited by the counsel on each side of this case, carefully, and we think thoroughly, and we cannot resist the conviction, from considering it all, that Mr. Roby did not intend, by those words in the will, to devise the eastern portion of this property thus entirely separated from the western portion by Prospect street; that he simply intended to devise to Mr. Hammel that portion of what was originally lot 121 upon which Mr. Hammel resided, and that that was the lot intended by him in this third subdivision of his will, and with that view of the matter, it follows that the decree must be in favor of the defendants and against the plaintiff.

T. H. Kellogg, for plaintiff.

Hamilton & Ford, for defendants.

STOCKHOLDERS LIABILITY.

Jurisdiction Notwithstanding Assignment.
Authority to Issue Preferred Stock.

(In the Circuit Court, Summit County. Present: Hons. Baldwin, Hall and Caldwell. J. April Term, 1894.)

The Painesville National Bank et al vs The King Varnish Co. et al. Decided April 15th, 1894.

(1—The Courts have jurisdiction of actions to enforce payment of unpaid stock subscriptions and stockholders individual liability, notwithstanding an assignment for the benefit of creditors, the assignee being before the Court and consenting that the issue may be determined there.

2—The existing stockholders for a corporation may, for the purpose of inducing others to subscribe to the unissued stock, agree that the new subscribers shall be paid a stipulated annual dividend, out of the net profits of the corporation, if profits are realized, before any dividends are paid to the stockholders then existing; subscriptions to the stock obtained under such an arrangement are valid and binding though not within the provisions of Sec. 3203 R. S. Such an issue of preferred stock, under an agreement with those then interested in the corporation, is an arrangement between the stockholders, in which they alone are interested and which may be enforced.

3—Subscriptions to the stock having been made between January and May 1886 and nothing having been done prior to the assignment of the corporation for the benefit of creditors in January 1889. HELD, that it was then too late for the defendants to make the claim that they were induced to subscribe for the stock by fraud, as against the creditors of the corporation.

4—A subscriber to stock may not wait until the insolvencies of the Company is assured and then, against a claim for the balance of stock subscriptions or individual liability, in behalf of the creditors, set up an independent indebtedness of the Company to him. So HELD, in accordance with the weight of authorities, though the claim seemed equitable and just.

5—A subscription to the capital stock of a corporation on the condition, in an oral agreement, that a certain other party subscribed for a certain number of shares, is not available as a defense against the creditors of the corporation.

6—A party may revoke his or her subscription to the capital stock of a corporation before it becomes a completed contract.

7—A stockholder who has disposed of his stock may be held on his individual liability for a proportionate share of the debts contracted while he was a stockholder.

Baldwin, P. J. dissenting from the last proposition on the authority of 46 O. S. 404. ED. LEGAL NEWS.)

HALE, J.

The King Varnish Company, was a corporation, organized under the laws of Ohio, in January 1883, and soon thereafter commenced business, and continued to carry on its business in the city of Akron, until

January 1889, when it made an assignment, of all its assets, to Albert T. Page, for the benefit of its creditors. The assets proved to be insufficient to pay the debts of the corporation.

The plaintiff, the Painesville National Bank, recovered a judgment against the corporation, after the assignment had been made, and brought this action for two objects and purposes: First, to enforce the payments of subscriptions to the capital stock, which it is claimed have not been paid, and are yet due to the corporation,—the first proposition, is to collect unpaid subscriptions; second, to enforce the individual liability of the stockholders, under the constitution and section 3258 R. S., for the benefit of the creditors,—both claims being made in behalf of all the creditors of the corporation. The original petition filed, omitted the first claim: that is, the claim against the stockholders for the non-payment of the stock subscriptions; but it was afterward brought into the case, by amendment. I need not stop to recite how. The two claims are before this court to be adjudicated.

The first proposition made is this: That there having been an assignment by the corporation, to an assignee, for the benefit of the creditors, this court has no jurisdiction to enforce the payment of the unpaid subscriptions to the stock, if there be any.

It will be conceded, that if no assignment had been made, the creditors could maintain this action to enforce the payment of the unpaid

subscriptions to the stock; and if that cannot be done in this action, it is because of the fact that there has been an assignment to an assignee.

It will be noticed that the same issue, in the attempt to enforce the individual liability in behalf of these answering stockholders, is made, as upon the other issue, and this court must determine, for the purpose of determining whether an assessment shall be made against the particular stockholders answering, whether that particular person is, or is not a stockholder in the corporation, and I can readily see that it would lead to some confusion, to hold that this court has not jurisdiction. Supposing that we should determine that these answering defendants, who make this question, are not stockholders of the corporation, and therefore refuse to assess it; I suspect that they would answer, when called upon in another court to answer to the assignee for unpaid subscriptions, that that question had been settled in a case in which both were parties. I am not saying that it would be a good answer, but certain it is, that that issue must be passed upon, not upon the question of whether the unpaid subscriptions shall be paid, or not, but upon the question whether an assessment shall be made against these parties, upon their individual liability. The assignee being before the court, and consenting that this issue may be determined here, we are inclined to hold that the same result would follow as if there had been no assignment; that is,

that we have jurisdiction to determine that question, and end the controversy; and we so hold. The assignee is a party here; he makes no objection, and, as we understand counsel who represent him, consents that that issue may be tried and determined.

The first proposition made, which is common to all defendants answering, is, that at the time of the subscription that was made by these defendants, to the preferred stock of the corporation, there was no preferred stock, and no power in the corporation to issue preferred stock, and therefore, the subscription, in such form, is without any validity, and cannot be enforced. The facts are these: The first step taken towards the issuing of preferred stock, by this corporation was this; that the stockholders, at a meeting, on the 11, of January 1886, passed this resolution:

"Resolved, in view of the statement rendered the Company by the president that the stockholders recommend the Board of Directors to take immediate steps to increase the sale of the Company's stock in such manner as in their judgment shall seem best."

On the 18, of January 1886, the directors passed this resolution:

"At a Directors meeting held January 18, 1886, D. L. King, Geo. W. Crouse, A. L. Conger, Joseph Hugill, A. T. Paige, being present. On motion it was resolved to issue preferred stock to carry out the resolutions of the stockholders passed 11th inst, and the President was requested to prepare a sub-

scription book and to solicit subscriptions to the preferred stock to be binding upon the subscribers when forty thousand dollars was subscribed, and to report to the Directors at a future meeting."

In pursuance of that resolution, the president of the Company, prepared a subscription book, which is as follows:

"We hereby subscribe to the preferred stock of The King Varnish Company the number of shares written opposite our respective names and agree to pay therefor the sum of one hundred dollars per share, in such installments as may be ordered by the Board of Directors of said Company, not exceeding twenty per cent a month. The holders of said preferred stock to be entitled to a dividend of six per cent per annum out of the net profits each year before any dividend is paid to the holders of common stock.

AKRON, January, 1886.

That was signed, or another precisely in terms like it, by all of these defendants who contest the validity of this subscription, and their liability as stockholders.

On the 3rd day of May, this subscription having been taken, there was a meeting of the stockholders, and all present assented to the scheme that had been inaugurated for the issuing of preferred stock, and all the old stockholders, except two, were present at the meeting. Mr. Miller, as I understand, was not present, and Howell S. King. Mr. Miller subsequently subscribed for fifty shares of this preferred

stock, and paid for it, acted as stockholder in the corporation; I think it may be safely said that he assented to this arrangement. It is in testimony also, that young King gave his assent; and we find, without any further discussion, that all the stockholders in The King Varnish Company, who were such prior to the 3rd day of May 1886, assented to and agreed to this issuing of preferred stock; and the question is, "What is the effect of such an arrangement?" It is claimed that preferred stock in the corporation could only be issued, after the organization of the corporation in pursuance of the provisions of section 3263 R. S., and plainly, this issuing of preferred stock by The King Varnish Company, was not in pursuance of that section of the statute; it was not an increase of the capital stock of The King Varnish Company; it was a disposal of stock that already existed. No certificate of the increase, and no certificate was filed with the Secretary of State, which would authorize the Company to issue other than common stock. But notwithstanding that, we hold that the existing stockholders of the corporation may, for the purpose of inducing others to subscribe to the unissued stock of the corporation, agree that the new subscribers shall be paid a stipulated annual dividend out of the net profits of the corporation, if profits are realized, before any dividends are paid to the stockholders then existing; and that subscriptions to the stock, obtained under such an arrangement, are valid and binding upon the subscribers to the

stock. We see no objection that can be made to an arrangement between the stockholders, who fully assent to, and adopt that mode of obtaining subscriptions to the stock of the corporation in which they are interested. It seems, to us, that there is no public policy involved that would forbid such an agreement, and when one signs and becomes a subscriber to the stock of a corporation, under an agreement with those that are then interested in it, that such an advantage shall be given to the subscriber of the stock, that it is an arrangement between the stockholders, in which they alone are interested, and which may be enforced; so that the objection made that this Company had no power to issue preferred stock is not sustained.

The next question made in behalf of many of these answering defendants, if not all, is, that they were procured to sign the subscriptions to this stock by fraud, such as vitiated the contract that they made, by making that subscription:

In answer to that claim, we hold, first: that the testimony fails to establish the fact that fraud was practiced upon these defendants. Second, that the subscriptions having been made between January and May, 1886, and nothing having been done prior to the assignment of the corporation for the benefit of creditors, in January, 1889, that it is too late for these defendants to now make the claim that they were procured to subscribe for the stock of that corporation, by fraud, as

as against the creditors of that corporation.

Now that, perhaps, deals with all questions that are common to all these defendants; and looking now to the individual claims made by each severally, it is said, in behalf of defendant Crouse, in addition to the claims already noted, that there is due to him, a large amount from the corporation, that arose by his endorsing and paying the paper of the company; and he says, that the amount thus paid by him, should be applied in reduction of his claim, so far as it depends upon unpaid subscription to the stock. My own motion, when the question was stated upon the hearing, was, that such a claim was clearly equitable and just; but I am driven from the position by the authorities cited, and which we have been able to find. No case has been cited to us, in which the proposition, that a subscriber to stock may wait until the insolvency of the company is assured, and then, as against the claim, in behalf of the creditors, to enforce the subscription of the stock by him, he may set up an independent indebtedness of the company to him. The authorities seem all the other way. We have found no case that would sustain the other proposition, and none has been cited to us. Hence, we hold against this claim; this off-set cannot be made. Mr. Crouse had acted after this subscription, with the corporation, and we know of no legal defense, unless we are wrong about some of those already passed upon, which would excuse him

from the payment, either of the unpaid subscription, or the amount due from him upon his individual liability.

Col. Conger appears upon this subscription list, a subscriber to the extent of fifty shares of stock, and there is no doubt but what he had a conversation with the president of The King Varnish Company, at the time he made that subscription, to the effect that David R. Paige, would assume three thousand dollars, or thirty shares of the stock subscribed by him, and he subscribed with that assurance from Mr. King; but we don't see how that can avail him, as against the creditors of the corporation. He subscribed for the fifty shares. He paid for twenty of them. He subscribed under an arrangement, outside of the subscription paper, with Mr. King, which has not been carried out.

Mr. Barber subscribed for ten shares of the capital stock of this corporation; he subscribed long prior to the 3d of May, up to which time, no one will claim that the corporation had completed its arrangement for the issuing of preferred stock, so that it could fulfill its agreement to issue preferred stock prior to that time. An issue is made, as to whether Mr. Barber did, or did not, prior to that time, revoke his subscription to this stock. Testimony has been given tending both ways, upon that proposition. We think, as a matter of law, if he did so revoke his subscription to the stock, he cannot now be held, because before it be-

came a completed contract, he might withdraw his proposition—could not be held—and it is not necessary to bring an action to annul a contract that never was made, because it was obtained by fraud;—it is not on that ground;—but it is on the ground that the contract had not become complete: it was a proposition made by him to take stock, and neither were in shape to enforce the contract against the other, until the 3d of May; and the question of fact is, whether he did so revoke that subscription, and the preponderance of the testimony is decidedly in favor of the proposition that he did so revoke it—not only from his own testimony, but from circumstances connected with it. An employee went from The King Varnish Company to the corporation, in which Mr. Barber was interested, he says, it was called to his attention, the condition of The King Varnish Company, at that time, and he went straight to the office of The King Varnish Company, and there, in express and explicit terms revoked the subscription. We think it must avail as to him.

Mr. Cornell makes precisely the same issue. Neither he, nor Mr. Barber had paid any portion of the subscription. Mr. Cornell was a subscriber to fifty shares of the capital stock. His executors now claim that he also revoked and repudiated the subscription that he made, prior to the 3rd day of May. We have read with care the only testimony upon that proposition given by the executors in his be-

half, that is the former testimony of Mr. Cornell himself. There is a very marked difference between the effect of that testimony, and that given by Mr. Baker, a very marked difference indeed. Mr. Cornell, at the time he made subscription to this stock, stipulated that there should be an indemnity delivered to him, indemnifying him against any individual liability upon that subscription. The particular indemnity was not furnished him that was agreed to be furnished him, but a certain paper signed by parties that are good, was delivered to him, which he retained, until the hearing of this case before the court below; and his testimony fails to show a clear, emphatic repudiation of this subscription, or such a one, as we think should free him from his obligation upon that subscription. We therefore decide that issue against the estate of Cornell.

What I have already said, I think, covers all the defenses or claims that can be made, in behalf of Mr. Seiberling, whether they are so, or not, we find nothing that should excuse Mr. Seiberling from responding to his liability as a stockholder of that corporation. The same is true of each and all the defendants answering, except as I have stated, Mr. Barber.

Now, there is no other claim made here, in behalf of Mr. Raymond, who was early a stockholder, and early got out from under the load; but not quick enough to escape all liability, if he is to be held for his proportion of the debts that

were contracted while he was a stockholder.

Without going into any lengthy discussion upon that proposition, I will state the court are not all agreed as to whether he should be held to a liability for the debt contracted while he was a stockholder or wholly released. The presiding judge is of the opinion, under the authority or discussion that is had in the 46 O. S. 404, that he should be released. A majority of the court, however, hold his liability to be substantially as determined by the Court of Common Pleas, that he is liable for his proportionate share of the debts contracted while he was a stockholder in the corporation, and the fact that that indebtedness has been carried, and by the renewal of the note that existed at the time, various renewals from time to time, carrying along the same indebtedness, does not relieve him from that liability.

Now, I believe that that is substantially all that is necessary for the court to indicate, in order that a decree may be drawn in the case, and a decree will be in accordance with the opinion here made.

C. S. Cobbs, Geo. G. Allen and E. F. Voris, for plaintiff.

Charles Baird, W. L. Marvin and Wm. H. Upson, for defendants.

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HAMILTON COUNTY CIRCUIT COURT.

Questions of Distribution Among Creditors.

Publication of suit by one creditor, who afterwards amends and sets up a different cause of action, does not give him priority.

No. 1789. Israel H. Pendery and others vs Albert C. Allen and others; error.

SMITH, J.

The Court of Common Pleas having rendered a judgment that the funds in the hands of the Sheriff and of Lowe Emerson, trustee, the proceeds of property formerly belonging to Edward P. Allen, should be distributed and paid to all the creditors of said Allen in proportion to the amount of their respective claims against him, the plaintiffs in error, who claim to have a preferred and prior claim there, file this proceeding in error to reverse such judgment. The facts in the case, briefly stated, are these: On February 1, 1886, Pendery filed his petition in the Court of Common Pleas against Albert C. Allen, Edward P. Allen, Lowe Emerson and others, alleging that, on July 16, 1885, said Edward P. Allen, without an adequate consideration, mortgaged to said Emerson certain real estate, and that, at the time, said Emerson held a chattel mortgage on a large amount of personal property, amply sufficient to secure his entire claim against A. C. and E. P. Allen. Wherefore it was prayed that said fraudulent conveyance and mortgage to Emerson be set aside and the property be sold to pay a debt of the Allen's to the plaintiff, which is set up.

On the second of February, 1889,

Pendery published a notice in conformity with the provisions of Sec. 6344, Rev. Stats. of the pendency and object of said suit. Some of the other creditors of Allen came in by cross-petition, and giving the security required by the section—others did not—and answer was filed by Emerson April 14, 1886, denying all the allegations of the petition as to the fraud and want of consideration of the mortgages.

At the trial of the case, March 12, 1889, in the Circuit Court, the plaintiff was allowed to file an amended petition, in which it was alleged that the mortgage mentioned in the original petition was made to Emerson when Edward P. and Albert C. Allen were insolvent, and for the purpose of securing a debt of E. P. Allen to Rone, on which Emerson was surety, and a debt of Allen to the Merchants' National Bank, on which Emerson was not surety, and that Emerson thereby became a trustee for all the creditors of said E. P. Allen. This court then held that such was not the case, and a petition in error was filed in the Supreme Court reversing that judgment, and there being a finding of facts by the Circuit Court, the Supreme Court proceeded to render the judgment which this court should have rendered, and declared Emerson to be a trustee of the property covered by the mortgage executed to him by Allen, for the equal benefit of all the creditors of said E. P. Allen in proportion to the amount of their respective claims; and that said trust be administered in accordance with

the provisions of the chapter of the Revised Statutes regulating assignments by insolvent debtors, and it was "further ordered and adjudged that the plaintiff in that court recover of the defendants such costs as were created in establishing his claim as to the character of said mortgage to be taxed."

We think that it is exceedingly questionable whether the publication of the notice of pendency and object of the original petition and what was done under it, gave to the plaintiff and those who came in as cross-petitioners and gave the bond on security mentioned in this section, 6344, the right to be first paid from the funds realized in the case. The plaintiff failed in his original claim, which was that the mortgage given by Allen to Emerson was fraudulent in fact. At the trial he obtained leave to amend, setting up an entirely different ground for relief. No notice of this was ever given to creditors. If it had been the ground of the original proceeding, who can say that many of the creditors who refused to come in on that claim as first made would not have done so?

But, however this may be, we are of the opinion that the final judgment of the Supreme Court, which must govern, has adjudged that the property in question was held by Emerson for the equal benefit of all the creditors of said Edward P. Allen in proportion to the amount of their respective claims. It is true that the judgment also provided that the trust was to be administered in accordance with the provisions of the

chapter of the Revised Statutes regulating assignments by insolvent debtors. But this, we think, points out only the mode in which it is to be done, and does not alter or modify the express statement that it is held for the equal benefit of all the creditors of Allen. The whole record must be presumed to have been before the Supreme Court, showing the notice as given, the amendment of the petition, and all that was done; and if it had been the purpose and intent of the court to hold that such notice and what was done under it gave priority to the plaintiff and part only of the creditors, it would seem that wholly different language would have been used.

We think, then, that there was no error in the judgment of the Court of Common Pleas distributing the fund, and it will be affirmed with costs.

Joseph W. O'Hara and Oliver B. Jones, for plaintiffs.

Edwards Ritchie, Reuben Tyler, Dan T. Wright and Von Seggern, Phares & Dewald, *contra*. (Court Index—Cin.)

HAMILTON COUNTY CIRCUIT COURT.

Street assessment where streets are improved on two sides of the same property.

Having paid the second assessment in full the owner cannot resist the first assessment on the ground that the two assessments exceed twenty-five per cent of the value of the property.

1863—Peter Brooks and Alice C. Brooks vs the Village of Norwood et al; appeal.

This action is brought to enjoin the collection of the unpaid assessments made by the Village of Norwood on a lot owned by the plaintiffs as tenants in common, situate on the — corner of Williams and Huston avenues in said village, which assessments have been levied for the improvement of Williams

avenue—one of the ten installments of which has already been paid by the plaintiff. The ground upon which the injunction is asked for is this: It is averred that the village, within the past tax years, has levied an assessment of \$459.55 upon said lot of the plaintiffs for the improvement of Huston avenue, and of \$79.30 for a sidewalk thereon, which has been fully paid by the plaintiff. That the value of said lot, after the improvement of both of said avenues, is \$1,560; and it is agreed that the assessments so made and paid for improvement of Huston avenue exceeds in amount twenty-five per cent of the value of said lot, after both improvements were made, and that as the owners of two-thirds of the property abutting on the improvement of Williams avenue did not petition therefor, that under the provisions of section —, Revised Statutes, as the improvement of Williams avenue was also made within the past four years, that they are not liable for any part thereof.

The evidence in the case shows that the improvement of Williams ave. was commenced and finished before that of Huston avenue, and that the assessment here complained of was duly made and levied before the assessment was levied for the improvement of Huston avenue. So far as appears, there was no legal objection to the validity of this assessment. If it be conceded that the petition for its improvement was not signed by the owners of two-thirds of the property abutting thereon, yet there is no claim or ground for claim that the assessment levied for the improvement of Williams avenue was in excess of twenty-five per cent of the value of lot of plaintiffs, and at the time it was levied, there being no other assessment on the lot for the improvement of any other street, it was valid and binding. If the vil-

lage, after this, undertook to improve another street; and to levy an assessment then on the property of the plaintiffs, which, with the assessment before made for the improvement of Williams avenue, made the total assessment for the two to exceed twenty-five per cent of the value of the lot, it was this last assessment which should have been attacked, and unless the provision as to the twenty-five per cent had been waived by the plaintiffs, they might have enjoined such part thereof as would make it exceed the statutory limit. But this plaintiffs did not do; they paid it in full and now seek to escape the first assessment—that made for Williams avenue. The improvements were separate and distinct, made under independent proceedings, and each must stand on its own footing. And if there was any error or want of conformity to the law in the assessment for the improvement of Huston avenue, this cannot in any way affect the prior rated assessment for Williams avenue, and plaintiff will not be allowed to recoup as against the assessment of Williams avenue the amount he may have paid, which he was not bound to pay, for the improvement of Huston avenue.

But aside from this clear principle of law, it would seem that the result which must follow will not be inequitable or unjust to plaintiffs in this case, when it appears from the evidence that this subsequent improvement of Huston avenue was made at the request of one of the plaintiffs, and who voluntarily agreed with the village and bound himself to pay the full amount of the assessment which would be made against this property. The relief prayed for will be denied, the injunction dissolved and the petition dismissed.

Krato F. Topp, for plaintiffs.

Wm. E. Bunby, for the village.
(Court Index—Cin.)

Toledo Legal News.

OFFICIAL LAW JOURNAL OF LUCAS COUNTY, OHIO.

In the matter of the designation of a daily Law Journal in Lucas County. As required by Sec. 1 of an Act passed April 14th, 1884 and amended Feb'y 25, 1886, entitled "An Act relating to the posting of court calendars and legal notices in certain counties," as amended May 9, 1894, the Judges of the Courts of Record in said County other than the Circuit Court, hereby jointly designate the TOLEDO LEGAL NEWS, a daily law journal published in said County, as the journal wherein until the further order of said judges, shall be published all the notices, advertisements, abstracts and matters and things specified or referred to in said Section 1.

Approved:
 GILBERT HARMON,
 REUBEN C. LEMMON,
 ISAAC P. PUGSLEY,
 Judges of Common Pleas.
 I. I. MILLARD, Probate Judge.

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SATURDAY, JULY 31, 1894.

AT PUT-IN-BAY.

The annual meeting of the Ohio State Bar Association at Put-in-Bay, which has just ended, will be remembered as one of the best in the history of the Association. Something like two hundred members were present and over sixty new names were added to the roll of membership.

The program was carried out as arranged with the exception of two numbers. Gov McKinley and Hon. J. Randolph Tucker were not present. The former was detained by official duties and the latter by illness.

The following is a list of the new members reported and elected at the opening session:

NEW MEMBERS.

Julius C. Pomerine, Coshocton.
 J. N. Albread, Greenville.
 D. W. Davis, Sidney.
 John A. Price, Bellefontaine.
 Chas. Benner, Akron.
 F. H. Stump, Akron.
 W. E. Young, Akron.
 George W. Carpenter, Delaware.
 Fred Hartenstine, Cincinnati.

Joseph T. Harrison, Cincinnati.
 Samuel Kohn, Toledo.

George A. Chase, Toledo.

F. E. Hutchins, Warren.

Hugh T. Mathews, Sidney.

Ralph S. Holbrook, Toledo.

Winchester Fitch, Geneva.

T. H. Hogsett, Hillsboro.

Charles E. Bow, Canton.

C. D. Wightman, Medina.

J. A. L. Campbell, Youngstown.

L. B. Fulton, Newark.

A. A. Thayer, Canton.

H. C. Bunts, Cleveland.

Thomas P. Dewey, Clyde.

J. D. Finch, Clyde.

D. J. Nye, Elyria.

James, Kennedy, Youngstown.

F. F. Idham, Cincinnati.

J. B. Waight, Mt. Vernon.

C. W. Fuller, Cleveland.

R. E. McKissen, Cleveland.

Thomas L. Johnson, Cleveland.

R. H. Hopkins, Cleveland.

S. C. Blake, Cleveland.

H. H. Johnson, Cleveland.

A. A. Stearns, Cleveland.

T. E. Burten, Cleveland.

F. W. Treadway, Cleveland.

P. B. Carpenter, Cleveland.

A. C. Dustin, Cleveland.

T. H. Gilmer, Warren.

The election of officers, held on Thursday, resulted in the selection of Hon. Chas. Pratt, of Toledo, as President; Frederick C. Bryan, was re-elected Secretary and Judge Pike is still the Treasurer.

Many of the addresses are worthy of special attention and for that reason will have a place in the LEGAL NEWS later on.

On Tuesday and Wednesday the Ohio Prosecuting Attorneys held an interesting meeting. The following officers were elected for the coming year. President, Jason A. Barber, of Toledo; 1st and 2nd Vice-Presidents, John D. Jones and W. R. Pomerine; Secretary and Treasurer, H. A. Myrkranz; Chairman Executive Committee, C. C. Williams, of Columbus; Chairman Judicial Committee, Paul Cook, Chillicothe.

RECENT CASES.

Hamilton County Circuit Court. in *Schwartz, admr. vs Cin St Ry Co* reported in Index, July 12, 1894, holds that to stand on the step of a street car, although entrance on that side is barred by a chain is not negligence *per se*.

The Circuit Court, of Belmont County, has held the law, vol 88 O. L., page 344 to be unconstitutional. The opinion by Laubie, J. was in a suit brought by *A. B. Gilmore vs The Wheeling Bridge and Terminal Co.* for compensation under the act referred to; Gilmore claiming that he worked four hours every day over ten hours and also worked on Sundays.

No more living question can be suggested than that of the legality of combinations of employers against employees or *vice versa*. In *Cole vs Murphy (Pa.)* 23 L. R. A. 135, a combination of employers to resist a demand for increased wages was held lawful on the sole ground that a statute had removed the illegality of a combination of the employees to enforce their demand. The court said that the combination of employers which would have been unlawful before the statute was impliedly legalized by legalizing a combination which it was obliged to meet.

One who volunteers to pay the debt of another, and subsequently seeks reimbursement, may be interested in the decision of *Crumlish vs Central Improvement Co.* (W. Va.) 23 L. R. A. 120, which denies an action at law against the debtor, but allows a suit in equity to compel the debtor to ratify the payment made for him, or to recognize the volunteer as an equitable assignee of the debt. A very extensive note to the case reviews the multitude of authorities on the effect of payment of a debt by a volunteer or stranger to the original undertaking.

The *Australian Law Times*, discusses in an entertaining manner the question whether or not a young lady who breaks her leg at a dance can maintain an action against her partner on the ground that it

was caused by his clumsiness. The writer intimates the opinion that a man who asks a girl to dance does not undertake to return her to her chaperon in as good order and condition as he receives her—"act of God and the Queen's enemies excepted"—but that at most his liabilities are those of a gratuitous bailee not extending beyond gross negligence. Or looking at the case from another side, that there is no implied warranty on his part that he is reasonably fit for the purpose for which he offers himself as a partner for a dance, as there is no sufficient consideration moving from her to him to support such a warranty. A further point raised is whether or not she did not voluntarily assume the risk of his unfitness. The writer adds that these questions were very fully gone into "in the somewhat analogous case of the bailment of a cab-horse, *Fowler vs Locke*, L. R. 7 C P. 272, 9 C. P. 751, note, 10 C. P. 90."—(Central Law Journal.)

The Supreme Court of New York, General Term, has just decided that the remedy provided by Sec. 4283 R. S. of the U. S. can only be enforced in those cases of which Courts of Admiralty have jurisdiction.

The statute referred to provides that the liability of the owner of a vessel for "any loss, damage or injury by collision" or for "any act, matter or thing, loss, damage or forfeiture done, occasioned or incurred without his privity or knowledge" is not to exceed the amount of the value of his interest in the vessel, or her freight then pending. And by Section 4284 such owner is authorized to take appropriate proceedings "in any Court" but a decision of the U. S. S. Court, in *Nowich Co. vs Wright*, 13 Wallace, 104, held that the U. S. Circuit Court was without jurisdiction to enforce the limitations of the statute; "that the remedy is confined to the jurisdiction provided by the statute which created the right."

This made the statute inapplicable to the case first referred to, reported in N. Y. Law J. July 14, 1894, as the action was to recover damages for injury done to boys on a pier, with which the vessel collided; over which cases a Court of Admiralty had no injunction.

JUDGE GROSSCUP'S VIEWS.

The views of Judge Grosscup on the Labor question will be of interest, particularly so on account of his immediate connection with the coming struggle, growing out of the great strike. His memorial address to the G. A. R. Post at Galesburg, Ill., May 30th, 1894, was devoted principally to a discussion of questions pertaining to property and labor. His charge to the grand jury which indicted the labor leaders has been very widely read and the personal views of the Judge appear in the last number of the Chicago Legal News.

Following references to Lincoln and a historical review, Judge Grosscup said:

The tide that bears Nations on its current never stands still. Each generation has its own battles to fight, its own questions to settle. Let the experience of the past, citizens and soldiers, lead us to face the dangers of the present like men. Every problem can be solved. The solution lies in the strength of the same public opinion which solved the problems of the past.

What are these new problems? In what direction shall we look for danger? Need I answer, when every eye is already turned to the uprisings that at this moment obstruct the currents of trade, and menace the orderly enforcement of the laws? A new industrial outlook confronts us. The old disputes that politically divided us are but few, and will soon be settled, and then we will be already in the midst of the new.

Without partisanship, I think I can say, that in my judgment, the agitation over the tariff is nearly at an end. The present industrial depression has taught us that when a basis of duties is once found, upon which our industries will be safe, it will, for a generation at least, remain undisturbed. I do not say, that the tariff will not be the question of the next political contest; I do not say that it will; the experience of the country between now and then, will determine that. What I mean is, that the people are determined to judge it once for all, and when it is so

judged, woe to that party that will seek to re-open it. We will then, for the first time, be fairly face to face with the burning questions of property and labor.

What is property? This continent, when discovered, was void of all things except nature. Here were the sea, the air, the soil, the forests, the undeveloped mines, and all the sources of our present material condition—an unconquered domain that belonged alike to all. The ships that touched these shores brought no riches except men willing to work. Little by little labor captured the offerings of nature, and after paying the debt of existence, laid the surplus away in her stock of accumulation. This was the first property. Little by little the stock grew. Those twin sisters of progress, labor and genius, worked their way upward, subduing the soil to agriculture, and building highways and factories, and to the sons of toil and invention came the harvest. But accumulation is only the vantage ground from which genius and labor work anew. Without it, the laborer and thinker would be reduced to their primitive condition; from it, a stepping stone, they mount to higher destinies. In time an industrial revolution came. The morning of inventiveness broke, when genius, overleaping the narrow boundaries, reached for the higher legacies of nature. Water surrendered to the powers of steam; the products of the mines were turned into steel; and the demons of the clouds became the swift messengers of trade. It is these revolutions that have brought forth suddenly a wealth of accumulation that at once dazzles and threatens society.

Three hundred years ago the wealth of the United States—that which labor had conquered and saved from nature—was probably not the equal of wealth to-day of the city of Galesburg. Now, it is upwards of seventy billions of dollars. Each year adds more than was the whole in the days of George Washington; each year adds more than was the whole cost and destructiveness of the four years of war, through which our veterans marched. The whole of it, though controlled by

individuals, is pre-eminently and beneficially the nation's wealth.

How, then, can there be any real contest between the accumulation and labor? Labor, the mother of accumulation, is maintained, not hindered, by her offspring. The wealth of the nation is everyone's possession. It is, in the highest sense, a common heritage. It makes possible to all the comforts which, a few years ago, were dreamed of only by visionaries.

Who is not rich to-day when compared with his ancestors of a century ago? The steamboat and the railroad bring to his breakfast table, the coffees of Java and Brazil, the fruits from Florida and California, and steaks from the plains. The telegraph puts him in instant touch with his far-off kin, and lays on his table every morning a mirror of what has transpired around the globe. The public drives and parks give him grounds, outrivaling in extent and beauty, those of peers and princes. The loom arrays him in garments, and the factories furnish him a dwelling, that the richest contemporaries of his grandfather would have envied. With health and industry he is a prince-heir to all the empires of wealth and effort that have gone before him. Labor cannot afford to attack capital, for capital is the house that she has builded. Capital can not afford to oppress labor, for such would make the house tenantless and a tomb. Will the conqueror destroy his trophy? Will the sower lay waste the harvest? United, their march from want to plenty is assured; divided and belligerent, they fall, for neither is complete without the other, and the fall of one would be the fall of both.

But the right to accumulate and the right to work, is a right of each person as an individual. It is not derived from the State, nor from society, but from the laws higher than either. It is a personal right, not because of citizenship, but because of manhood. No government, no aggregation of individuals, can rightly interfere with or restrict it. Labor simply turns into the uses of civilization what the Creator has laid at our door, and the

individual right to do this, and to use unrestrictedly its fruits, is the primary and highest inheritance of mankind. It will be a mighty revolution when the owner of the brawny arm and the willing heart can no longer employ them upon whatever he finds to do; when the possessor of a teeming brain shall have its children taken away the moment they are born, or develop usefulness; when the gatherings of labor and brain—their stock of savings—cease to be within the exclusive touch and control of the producer. Would you mortgage arm and intellect before they are born? Would you bar them out of fields to which civilization hitherto has beckoned them? Would you paralyze the nerve centers of civilization, by removing every inducement and inspiration to individual effort?

Then, listen not to those dreams of socialism that would level out, with heavy roll, all individuality and personal manhood, and crush all brains, arms and hearts into the sodden mass called collective communism. In that day, a man will no longer be a man—no longer even an independent unit—but blended into the mass, will be shorn of individuality and robbed of incentive, until life and effort have become without a note of hope to herald the dawn of a better day. From independent princes, masters of their persons and belongings, and set out on the conquest of greater things, man will become a spiritless slave, in a gang of slaves.

But there is no imminent danger, in America at least, of out-and-out socialism. The disease that is creeping in is much less radical, but much more insidious. This right, as individuals, to work and to accumulate, and to keep personal control of his labor and accumulations, is a right which society cannot permit even the individual to voluntarily surrender. Right here is the germ of our national crisis.

The last half of the century has revolutionized our material progress. The industrial forces set in motion by steam and electricity have almost changed the structure of material civilization. These

vast powers could only be utilized by vast aggregations of capital, which no individual alone could advance. Hence there came that mighty unification of property now embodied in the corporations and other organizations which commerce and trade so universally employed. With this contribution of individual property to corporate management, came the surrender of individual control to directories and committees. Thus a system has grown up, embracing a large percentage of the accumulations of the nation, in which the holdings of the individual have passed from his control into that of representatives. Formerly, representative government was confined to political rights; in the last end of this century its methods have almost absorbed personal and property rights.

This system, beginning originally with those great enterprises, such as railroads and steamships, that could find realization under no other methods, has extended, until it comprises a majority of the manufacturing and commercial ventures. The tendency shows no sign of running out. On the contrary, day after day, men are still further losing individual control of their property, and already, as the result, in many branches of industry at least, the combinations are so strong that the continuance of individual competition is impossible.

It is not surprising, that in the presence of these phenomena, labor should also have learned the art of organization. From little societies, where obligations were voluntary, it has gone on, until, in every specialty, workers to-day are compressed into unions, where the individual will is merged in the master will of a ruler or committee. Before a boy can learn a trade he must receive a permit from the supervising body; and before he can work at his trade he must marticulate into the obligations which the union imposes. The remainder of his life as a mechanic is simply one long subjection to the direction of others. He can work only when they grant leave, and at wages that shall have received their approval, and he must be ready, at any notice, to

deliver up his family to hunger and the street, when the call for a strike comes.

He has effectually sunk his will into the general will of his trade, and has cast away, for organization, all the advantages and inspiration of independent individuality. But the spirit of organization once stirred does not stop. The trade unions are each year approaching a closer consolidation; and the time is not distant, if not already upon us, when a single union will, for all the purposes of strike and menace, be in control of all branches of labor. In that hour, the bricklayer or the boilermaker will not simply have delivered over his personal rights into the keeping of his fellows of the same craft. A still deeper tyranny will have overtaken him. His rights will then be subject, not alone to the will of those who likewise lay bricks or suake boilers, but to the remote, and to him, entirely unintelligible exigencies of crafts with which he has no personal relation, and to whose principles and demands he may be an entire stranger.

I do not say that this surrender of individuality, either by the possessor or capital or by the worker, is opposed to our laws as they stand to-day. I am not now interpreting those laws. What I do say, however, as a citizen, is, that sunken individuality carried down too far, will destroy the basis on which business in the long run can be successful; and that it debases the man.

The success of commercial society depends upon a free play of competition. There is no other method that will not eventually end in tyranny or explosion. What is competition? It is the free play allowed to individual intellect and labor. It is that condition in which every man, starting on an equality with his fellow is permitted to push his fortunes as far as he can personally control them. Under its regulation, each worker and property holder can, in the single-handed strife of industry, measure lances with his fellow-men. Introduce combination, and a single handed contest is no longer possible. The individual must retire from the field, or ally himself with other forces, in the

mass and strength of which his individuality is lost. The gifts of nature are no longer open to conquest by man as an individual, but only to armies of men, and thus are shut out the equal opportunities to which he should be born. Equal opportunity! It is the bow of promise that beckons always; it is the shield that protects against combined adversaries; it is the fountain from which are drawn the truth and inspiration that makes us wish to live and labor. But there can be no equal opportunity, when the key to all opportunity is kept by any mind less than the infinite.

This is not a question of mere economics. However strong are the arguments drawn from the necessities of competition, yet stronger are the demands drawn from the necessities of manhood. Personal independence is the highest requirement of advanced manhood. Subjection to the will of others, and absolute surrender to the direction of others, is the first step to decline, or absolute debasement. I say this, not of the worker alone, but also of the men of property. He who wholly surrenders his possessions to another's will, is no longer a useful factor in the world's industrial progress. His growth as a general wealth-maker has ended. His property may live and increase, but his intellect and personality are entombed.

I have no quarrel with labor unions as organizations to better the conditions of their members. The right of each to rise in the world is sacred, and if his rise can be accelerated by association with his fellows, no one can rightly object that the opportunity is embraced. Labor is a commodity peculiar to itself, and a union of laborers, in a common field, to enhance the price of the commodity is not only tolerable, but is right. I admire the brothers who stand side by side to advance their common interest. But the worker falls into error who surrenders his independent manhood to the decrees of a combination; and the combination is revolutionary when it aims by force to deprive any citizen of that which is his birthright—his accumulations or his right to labor.

Neither have I any quarrel with that

mobilization of capital which is essential to some of the greater projects of industrial development. The railroad the telegraph, the steamboat, and many of the other adjuncts upon which the movements of the present day are carried, must, in the necessity of their constitution, gather into a central management the control of individual capital. They are the legitimate objects of corporate existence—that intangible life to which the State gives birth in the promotion of its great purposes. But it is time that we should debate whether corporate and all other consolidated management of individual holdings should not be denied, except in those necessary agencies, without which industrial progress could not be achieved. It is time that we should review, I think, the general policy grown up in the United States, of conferring corporate existence upon every lawful project. The license, thus extended, has done more than anything else to obliterate the individual from our industrial life, and to bring on the tyranny which consolidated power always exercises. It is especially time that, in the management of business enterprises, the old privileges of competition should be re-established, and the heavy hand of impersonal combination be removed. The exercise of a power that prevents any man from the pursuit of such a calling as his means permit, without subjection to the obstacles of unequal conditions, ought to be as lawless, as the imposition of restraint upon a right to work.

The further growth of labor and industrial organization can have but one tendency. It divides mankind into two camps. In one the enforced discipline leaves no will, but that of the leader, no individuality except that of the *corps d'esprit*. In the other, the loom of consolidation is weaving into single fabrics the individual holdings and personality of America proprietorship. In the latter as in the former, individuality, dependent upon the generalship of the leaders for returns, and upon their consciences for the discharge of obligation to others, will soon be lost altogether. Two armies thus highly organized, and in their aims neces-

sarily antagonistic, can not avoid a clash, for little ground is open for conference or adjustment between leaders who are thus feeding upon their sense of power. Most of the wars of mankind have been the battles of personal ambition, battles that would have been avoided, could the rank and file have freely intermingled with each other and taken on the sense of justice that such close contact imparts.

The present industrial conditions of America by unnaturally depositing the entire interests of life into the keeping and discipline of these antagonistic organizations, can only be a repetition of history. It is the drawing of a Rhine between the men of toil and the men who own, and conflicts like those of the Teuton and the Gaul must be expected. Obliterate this river of division. Restore to each individual, by the enforcement of law, not simply his right, but if possible, a returning sense of duty to control his own personality and property. Let us set a limit to the field of organization, and the people, freed from the restraint of interest and allegiance, will again intermingle, and the clash of antagonism be replaced by the sympathy and wisdom that attends the personal association of independent men.

In 1858, you who are veterans, stood upon the brink of a revolution. The ground underneath you shook with an aroused sense of the injustice of African slavery, and the fear of its extension. We, the sons of these men, are also upon the ground that quakes. The slavery of the individual—the submergence of independent manhood beneath the crest of these rising industrial artificialities of capital as well as labor—is the convulsive power underneath us. Our fathers knew not how to escape. The radical on one side, the ultra-conservative on the other, gave no direction to their minds. But when Lincoln spoke, the difficulty in exactness was seen, and the truly conservative remedy pointed out. We may not yet discern the exact methods by which our emergency can be met. The time perhaps is not yet ripe. Public opinion is not yet settled to that common

level from which the heights and depths of the questions can be measured. Our Lincoln may not yet be born. His coming, to teach us how a house divided against itself need not fall, we must await. But under present leadership, and in our present condition, there is at least one thing we can do. We can hold to, and teach the gospel of independent manhood. Entangled in the meshes of industrial and labor artificialities, we must keep steadily in mind that every man is an independent personality, who must reconceive, and live up to, the duty of personally controlling himself, and all that he has achieved. A sovereign man waits to be emancipated.

The cause is not hopeless. No cause can be which has the sovereignty of the man for its watchword. The kind of underlying intelligence that brought about the verdict of 1860, and its performance on a thousand battle-fields, will overtake and direct these latter problems. Herbert Spencer tells us that underneath all the phenomena of life there is an energy that unifies it. In my religion that energy is God. His ways may be occult, but out of conditions He always brings results. The pathway over which mankind has come has always been upward and betterward. I see declivities before us, and precipices yawning on either side, but yonder are the higher plains, where richer harvests will yield to the sickle of endeavor and where the brow of independent manhood will be bathed in more radiant sunshine. Let us keep our faces that way, until the new prophet with the new message, has been sent to lead.



The Toledo Legal News,

\$3.00 PER YEAR.

In Advance.



U. S. Circuit Court.

Northern District of Ohio--Western Division.

Filings.

1182—Farmers' Loan & Trust Co. et al vs Tol A A & N M Co. Opinion on application of receiver for instructions in relation to car trusts. Also order on petition of Post Martin & Co. Both to be reported.

1213—McDonald vs The Tol Cen St Ry Co et al; demurrer of Tol Con St Ry Co.

1168—Cornell University vs Village of Maumee; deposition of John J. Shipherd.

Alex Kidd, owner schr Aurora, vs Lawton, Bartelle & Co; opinion of court; to be reported.

1158—City of Toledo vs Geo W. Burwell et al; motion for new trial by B. E. Bullock overruled.

1158—Same vs Same; notice of B. E. Bullock for appeal filed; King & Tracy, attys.

1158—Same vs Same; motion for new trial by Phineas S. Newton overruled.

1158—Same vs Same; notice of Phineas S. Newton for appeal filed; King & Tracy, attys.

1158—Same vs Same; appeal of Phineas S. Newton and B. E. Bullock allowed.

1087—Electric Supply Co vs Put-in-Bay W. W. L. & Ry Co; order June 12 not having not been complied with that part of order, dismissing case set aside unless money paid by day of sale; order of sale; see journal.

1228—Wm. J. Comstock vs Oscar W. Irish et al; decree pro confesso made absolute; decree for compts and order sale.

U. S. District Court.

In Admiralty.

169—Eley vs Str. Shrewsbury; praecipe for subpoena for witness on behalf of

Buffalo T. & S. D. Co; Swayue, Swayue & Hayes, Proctors.

175—Ephraim E. Conrad vs barge Brooklyn; libel of Chas Beck and Wm Beck dismissed; default as to all other libellants; order for distribution; see journal.

169—Jno M. Eley et al vs Str Shrewsbury; motion to amend return of marshal overruled; trial and judgment for libellant Eley et al for \$1461.22 and int.

175—E. E. Conrad vs barge Brooklyn; libel of M. I. Wilcox Cordage and Supply Co against proceeds sale \$175.84 filed; F. W. Rickenbaugh.

169—Wm Beck and Chas. Beck vs Barge Brooklyn. Motion for new trial and to set aside decree. C. T. Johnson, Libellants Proctor.

171—S. R. Callaway Recr vs Orient Insurance Co. Opinion of the Court. Decree for amount of shipments endorsed in books for the cargo of the Dean Richmond for Oct. 13, 1893.

Court holds that if parties can not agree upon the amount of the loss, then reference to master. to determine, shall follow. To be reported.

177—Geo M. Disdrow vs Tug M. A. Green, libel for seamans wages \$60. F. W. Rickenbaugh, Libellants Proctor.

Chas W. Williams vs same. libel for seamans wages \$71.33. Same Proctor.

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TOLEDO, OHIO.

CAR TRUST CONTRACTS.

(In the Circuit Court of the United States for Northern District of Ohio, Western Division June Term, 1894. Present, Hon. Augustus J. Ricks.)

Farmers Loan and Trust Co. et al vs Toledo, Ann Arbor & North Michigan Railroad Co. et al. Consolidated cause 1182; in Equity. On application of Receiver for instructions in relation to car trusts.

RICKS, J.

Soon after the appointment of the receiver for the defendant railroad upon the creditors bills, Post, Martin & Company filed an intervening petition setting forth that the defendant company had possession of a large number of cars and engines under a contract of lease, which rolling stock was in the possession of said defendant company at the time the receiver was appointed. The petition averred that the vendors were willing that said Receiver should continue to use said cars, locomotives, railroad equipment and rolling stock, and the remaining cars and two locomotives to be delivered to said Receiver for like use, provided said receiver be authorized and directed by the court to perform the covenants of said agreement, and particularly to make the payments stipulated, and keep the railroad equipment and rolling stock in proper order.

Thereupon the Receiver filed an answer to said petition, advising the Court that all of the rolling stock and equipment referred to in said intervening petition was necessary for the proper management and operation of the road and to meet the demands of the shipping public, and the Receiver therefore asked for an order authorizing him to retain possession of the same. Upon said intervening petition

and answer, the Court made an order that—

"Said Receiver be and he is hereby authorized and directed to continue in the possession and use of the cars and locomotives, railroad equipment and rolling stock now delivered, and to receive and use that not yet delivered, during the receivership of the railway and property of the Toledo, Ann Arbor & North Michigan Railway Company, or at least until the further order of the Court. And the said Receiver, or his successor, is hereby authorized and directed to perform the covenants of said agreement between Post, Martin & Co. and the Toledo, Ann Arbor and North Michigan Railway Company, dated January 20, 1893, and in particular to make the payments stipulated in the third clause of said agreement, and to keep said cars, locomotives, equipment and rolling stock in proper order and repair as provided in the 15th clause of said agreement. But nothing herein shall be construed as creating any obligation beyond the period of said receivership, or as creating any lien upon any other property of the said Toledo, Ann Arbor & North Michigan Railway Company than the cars and locomotives hereinafore described."

This application, the answer of the Receiver, and the order of the Court, fairly show the terms upon which said rolling stock and equipment has been in the custody and possession of the Receiver. The Receiver, on the 15th of June last, filed an amended answer setting forth that since the filing of his original answer it has come to his knowledge, and he is advised by counsel, and alleges and charges the fact to be, that no lien, either legal or equitable, of any kind or description, was created by the contract, a copy

of which is annexed to the petition; upon the rolling stock more particularly described in the schedule on the first page of said contract. The receiver therefore prays that an accounting may be had of the payments made by him under the further orders of the court herein on account of the rolling stock, and that the proper application of such payments as the justice and equity of the case shall seem to require. On the 18th day of June the receiver notified Post, Martin & Company that the 1000 cars and the ten locomotives could be subject to their orders after July 1st.

On the 22d day of June last, the Receiver made a further application to the court for instructions in reference to his duty to Post, Martin & Co. by virtue of his having had control and possession of the rolling stock above referred to, averring that he had paid, under the former order of the court, to said Post, Martin & Co., the sum of \$60,998.90. The receiver further represented that owing to the commercial conditions involving a general falling off of business, the necessity for the use of a large amount of the new rolling stock and equipment mentioned in the contract of Post, Martin & Co., has entirely disappeared. He further avers that he is satisfied that said railway property cannot and will not produce a revenue sufficient, after making the necessary repairs and improvements, to pay for the use of the same; that in fact most of said equipment is entirely idle and produces very little revenue, and that in the judgment of the receiver the property can be successfully operated by the use simply of the rolling stock and equipment mentioned in the first paragraph of the preamble of said contract, that hereinafter called, for the sake of brevity,

the "old rolling stock;" that he is and will be utterly unable to make further payments out of the revenue arising from the operation of said new rolling stock, as provided by the former order of the court; that the net earnings of the railway property in hand for the month of May, 1894, was only about \$7,000.

Said Receiver further avers that, being advised that Post, Martin & Co claim the right, under their said contract, to take possession of the old rolling stock, as well as of said new rolling stock and equipment, on account of default in the payment of the consolidated lease warrants provided for in said contract (which would strip the property of all its rolling stock) and being advised by his counsel that the contract, a copy of which is annexed to said petition of Post, Martin & Co., did not create any lien upon the said old rolling stock in such wise as that the payment of the lease warrants provided for in said contract should be made a charge upon the revenue arising from the operation of said old equipment and rolling stock, on which unpaid lease warrants were outstanding at the date of said contract to the amount of \$66,373.52, and being satisfied that the economical and efficient management of said property made it highly desirable to dispense with said new equipment and rolling stock, the receiver had, on or about the 15th day of June, 1894, for the purpose of relieving said old rolling stock and equipment from any lien or claim by reason of outstanding lease warrants under said pre-existing contracts, and to the end that the possession and control of said old equipment might be secured, tendered to said Post, Martin & Co., as holders of said lease warrants under said contracts, the full amount due thereon, with inter-

est up to said date, and demanded the surrender to him of such former lease warrants, which tender and demand were declined and refused by said Post, Martin & Co. Thereupon the receiver prayed for instructions as to his duty in the premises.

Counsel for Post, Martin & Co. claim that the tender of the amount due under the lease warrants referred to by the Receiver was not the full amount due, and that the tender was coupled with two conditions: First, to surrender the ancient lease warrants; and second, to split the contracts and take part of the cars back; that said tender was made without the order of court, and that the petitioners were not bound to accept the same.

I think it is well settled that the Receiver, having been appointed in April, 1893, under the judgment creditors' bill, any sum that may be due from him to Post, Martin & Co. for rental of cars found on the road by him when appointed, and of which he took possession, would only be a charge upon the income derived by him from the operation of the road, and subject to other claims upon such income due to the judgment creditor who filed the bill and others who might establish their claims and liens upon such fund. Therefore the order of the court, appointing the Receiver, limited him to pay out of the income which should come into his hands in the operation of said railroad or otherwise, all rentals to become due on rolling stock therefore sold or leased to said railway company and partially paid for, and necessary for the business of the road over which said Receiver was appointed. Post, Martin & Company, at the time they filed their intervening petition consenting that the

receiver take possession of said rolling stock, were advised of the nature of the bill under which the receiver was appointed, and of the character and limit of the income out of which payments could be made. I think it very plain from these successive orders and petitions and answers that no other liability beyond the receivership was contemplated, and no other lien was provided for. The Receiver, now operating the road under the bill filed by the trustees of the various mortgages, very properly, finding a part of this rolling stock useless in his hands, and realizing that the rental to become due therefor would be a charge upon the body of the property, now makes application for some disposition of this unused property. It is evident that this equipment, not in use, ought to be turned over to Post, Martin & Co. Counsel for the vendors concede that such an order should be proper. All they ask is that it be not too summary in its character, and that an accounting may be had as to the claims heretofore made, and as to the amount still due, and that the Receiver be authorized to arrange with Post, Martin & Co. as to what part of said equipment he will retain, and what part he chooses to re-deliver.

It is claimed on behalf of the Receiver and trustees that as this property has been idle for some time, and a useless expense to the Receiver, it should be promptly delivered to the vendor, to the end that a further charge upon the body of the property may be avoided. The Court concedes the equity of this suggestion and demand, and approves the action of the receiver in calling the courts attention to the fact that so large a portion of this equipment was not necessary for the operation of the road, and

asking for instructions in relation to the same. It would be exceedingly inequitable to allow this idle equipment to continue in the possession of the Receiver, and to accumulate a charge against the estate which would diminish the fund eventually to go to the beneficiaries under the several mortgages.

But at the same time, the Court must deal fairly with Post, Martin & Co., under all the circumstances heretofore set forth. They have rights to be considered and the Court owes them a duty as well as the bondholders. If the receiver had asked for these instructions earlier, and had thereby been enabled and authorized to give Post, Martin & Co., earlier notice of the fact that this equipment was not of use, the court might be justified in fixing a short period within which this rolling stock should be delivered. This would have enabled them to have found a purchaser or a lessee for the equipment.

Counsel representing both sides to this controversy have submitted to the court the form of an order embodying the questions which, in their judgment, ought to be submitted to the master under the order of reference which they all agree is now proper. Some of these entries seek to determine permanently some legal questions involved, which may very properly be reserved for the coming in of the master's report.

In the very short time given me for the passing upon these questions, just before the summer vacation, I do not feel that it would be just to finally determine some of these important questions. I have this day signed an order, which will be filed for entry with this opinion, which settles the questions presented by counsel.

PATENTS—LAMP CHIMNEYS.

(In the United States Circuit Court for the Northern District of Ohio, Western Division. June Term, 1894. Present, Hon. Augustus J. Ricks).

983—In Equity—George A. Macbeth and George A. Macbeth & Co. vs The Globe and Chimney Glass Works, Limited. RICKS, J.

The bill in this case is for an injunction to restrain defendants from manufacturing lamp chimneys, which it is claimed is an infringement of design letters patent No. 14373, granted to Henry Dietrich October 30, 1883.

This bill avers that this patent has been adjudicated as valid by proceedings:

1. In the Circuit Court of the United States for the Western District of Pennsylvania, in December, 1886, and in a decree entered in favor of the complainants against Evans & Co.; that said decree was entered after full hearing, finding the Dietrich patent No. 14373 to be valid and allowing a perpetual injunction.

2. In a suit in the United States Circuit Court for the Eastern District of Pennsylvania brought by the complainants against Gillinder and Sons; that said case was heard before Circuit Judge McKinnan, who also heard the case before stated against Evans & Co., and after a full hearing and testimony a decree was entered affirming the validity of the same patent design above named and awarding a perpetual injunction against the defendants.

3. That in a similar suit brought by the complainants against The Braddock Glass Company, Limited, in the United States Circuit Court for the Western District of Pennsylvania in July, 1890, a de-

cree was entered against the defendants affirming the validity of the same patent design and awarding an injunction against the defendants for making chimneys such as shown in exhibits "Braddock" Nos. 1, 2 and 3 filed in said cause.

The answer denies infringement and claims that the several suits set forth in the bill were collusive suits and that the decrees entered therein were taken by consent of defendant's counsel and not upon full hearing on the merits in either case.

The answer further sets forth a number of designed patents which were publicly used before the Dietrich design patent set forth in the bill was granted and claims that the patent sued on in the bill is valid. An injunction was allowed in this case on October 11th, 1890 upon the bill and affidavits filed setting forth substantially the averments now made in the bill of complaint. The complainant's testimony fully sustains the averments of the bill. The evidence discloses the fact that each of the three suits tried as stated in the bill were fully and fairly contested by the defendants and heard upon the merits upon proof and full argument. A decree was entered in each case sustaining the validity of the defendant's patent.

I find from the testimony that the glass chimneys made by the defendant were substantially similar to those made by the different defendants in the cases referred to in the bill.

It seems to me after three Circuit Courts have affirmed the validity of defendant's patent upon a full hearing in which the chimneys made by the defendant were substantially the same as those made by the defendants in this case the Court should not be required to enter

very fully into a discussion of the merits of this case.

The defendant has wholly failed to support its answer by proofs. I think the chimney tops made by the defendant offered in evidence as exhibits by the witnesses on behalf of the complainants are a clear infringement of the design patent set forth in the complainant's bill.

I think any purchaser calling for "Macbeth Pearl Top Chimney" and who should be furnished a chimney similar to "Exhibit Globe No. 1" could easily mistake the latter for the former and would make the purchase supposing he had received the article for which he called.

I think the infringement is clearly made out and that the complainant is entitled to a decree affirming the validity of the design patent set forth in the bill and for an accounting as to profits and damages and a perpetual injunction. A decree may be prepared accordingly.



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CONTRIBUTORY NEGLIGENCE.

Verdict of Jury Set Aside and New Trial Granted.

(In the Circuit Court of the United States for the Northern District of Ohio, Western division, June term, 1894. Present, Hon. Augustus J. Ricks.)

Frank. B. Craig vs Lake Erie and Western R. R. Co. : On motion for a new trial.

RICKS, J.

The jury having returned a verdict for the plaintiff in this case, assessing his damages at the sum of \$15,000, the defendant now interposes a motion for a new trial on two grounds: First, that the verdict is contrary to the weight of testimony showing negligence on the part of the defendant; second, that the preponderance of evidence shows contributory negligence on the part of the plaintiff, and that for these reasons the verdict should be set aside.

The negligence alleged in the petition, and the question of fact submitted to the jury, was as to whether the defendant had properly blocked its frog in the freight yard at Lima in accordance with the requirements of the Ohio statute. There was great conflict in the testimony as to this particular fact. The testimony was not only almost equally balanced as to the number of witnesses who testified on one side and the other, but it was also nearly equally balanced weighing this testimony according to the disinterestedness of the witnesses, and their opportunity for knowing the facts of which they

testified. But, as the Court said to the jury in its charge, this was purely and entirely a question of fact on which they were entitled to pass. There was certainly not such a preponderance of evidence in favor of the issue as made by the defendant as would justify the Court in directing a verdict for the defendant. The conflict in the testimony upon this question of fact was of such character that the Court would not be justified in disturbing the verdict of the jury if it had found either way.

The defendant claims, in addition to the grounds above stated, that the testimony was insufficient as to the place where the plaintiff's foot was caught in the frog. It insists that there was nothing to show but that the plaintiff's foot was caught in that part of the frog which did not require blocking, and argues from the testimony of the witness Hughes that he found the plaintiff's shoe at that point of the frog. But this was also a question of fact so disputed as to be proper to submit to a jury, and I see no reason for disturbing the verdict on that ground.

The second point to be considered is whether the testimony tending to show plaintiff's contributory negligence was so strong as to justify the Court in setting aside this verdict on that ground. There are several important facts to be considered in disposing of this question. First, it must be considered that Craig had such control of this switching crew as made it not only possible but his duty to

switch those cars in the safest manner possible, consistent with his duty to the company. There were only two cars attached to the engine to be switched at that time. There was no need for haste. There was no emergency calling for very speedy action. The engine could have handled those two cars in a manner to have made the uncoupling of them perfectly safe. The engineer was in speaking distance of Craig, and he could have explained to him the situation, and directed the movements just as he wanted them. There was no reason why a flying switch should be made, or that it should be done in such haste as to needlessly expose the plaintiff to danger. He admits in his own testimony that the engine and cars were at a standstill. He then had a right to see whether he could uncouple those cars while they were so standing still, and kick the car to be switched back onto the track on which it was to be delivered. He did not make any effort to uncouple them while the cars were standing. He chose to make the attempt while they were in motion; he gave the signal to the engineer when they should start; after he had given the signal, he voluntarily stepped between the cars while they were going at a speed of from four to six miles an hour; he says in his testimony that he walked ten or twelve feet while the cars were so moving, but he may have walked further than that. While going at that speed, he says he tried to loosen one pin, and finding it tight, pulled the other. He did this while the

train was moving at the rate of speed named. A train running at the rate of five miles an hour moves seven feet every second. It would have taken certainly five seconds to have made the movements which he himself says he made at the time, so that he must have walked at least thirty feet while making the effort to uncouple. The night was dark; his lantern threw no light on the track except when he held it down, as he himself admits; he was familiar with the ground over which he was passing; he had worked near that yard previous to his employment by the defendant; he had been a switchman and a brakeman for the defendant for some time, long enough to have made him very familiar with the localities in the yard. He knew when he went in between those cars he was near to frogs and switches; he must have known, therefore, of the risks that he assumed. As these risks were unnecessarily taken, for the reasons stated, he must be held accountable for the results.

The Court hesitated for some time as to its duty in view of this testimony. It seemed a proper case to direct the jury to return a verdict for the defendant on account of this evidence of contributory negligence, but I preferred to submit it to the jury as a disputed fact. I think now the preponderance of testimony showing contributory negligence is such as would make it wrong to allow this verdict to stand.

The plaintiff has been most hor-

ribly mangled, and his case is one which appeals very strongly to the sympathy of the Court. It certainly appealed to the sympathy of the jury, for I cannot but feel that they disregarded the instructions of the Court in failing to fairly weigh the evidence as to plaintiff's negligence. It is therefore my duty to set aside this verdict, and to order a new trial.

Cable & Parmenter, King & Tracy, for plff.

W. E. Hackedorn, John B. Cockrum, Walter B. Ritchie and John M. Lemmon for deft.

The first two cases reported in the June number of advance sheets of United States Supreme Court decisions, L. R. A., are both celebrated, in their way. The first is that of John Y. McKane, Ex-Ruler of Coney Island. Belva Lockwood's application for a writ of mandamus requiring the Supreme Court of Appeals to admit her to practice in that Court, is the other. The writ was denied. The following is the official syllabus:

1—The refusal of the Supreme Court of Appeals of Virginia to admit the petitioner to practice law in that court on the ground that she is a woman, does not deny to her any privilege or immunity of a citizen of the United States.

2—The right to practice law in the State Courts is not a privilege or immunity of a citizen of the United States.

3—It is for the State Court to construe a statute of the state in regard to the admission of persons to practice law in its courts, and to determine whether the word "person" therein used, is confined to men, or includes women.

OIL AND GAS LEASES.

Conditions Requiring Lessee to Perform Certain Acts Within Certain Times. Right to Operate and Develop Adjacent Lands an Option Personal With the Owner.

(Wood County Circuit Court, April Term, 1894. Present: Hons. C. S. Bentley, P. J., C. H. Scribner and G. R. Haynes, J. J.)

Emerine, et al., vs Albert J. Steel. Appeal from Wood County Common Pleas Court. Decided May 24, 1894.

(The condition in an oil or gas lease whereby the lessee shall have a right to operate land adjoining a tract named in the lease, provided the owner elects to have said additional territory operated and developed, is personal between the owner and the lessee. The former not having elected to have such land operated, a bona fide purchaser takes the same free from any right of such lessee. A party purchasing the land is bound to inquire and know only whether the owner had or had not elected to have the land operated under the lease.

2—Conditions in an oil or gas lease requiring the lessee to perform certain acts within certain times are to be regarded as strongly in favor of the lessee and the time during which injunctions against such lessee are in force should not be allowed in determining whether or not the conditions were performed within the time prescribed.—ED. LEGAL NEWS.)

SCRIBNER, J., (Orally.)

The petition in this case was filed in the Court of Common Pleas of this County for an injunction to restrain the defendant from sinking a certain oil well on a certain piece of land described in the petition.

On the filing of the petition, application was made to the Probate Judge of Wood County for an injunction which was granted by him. Afterwards the case came on for hearing on the pleadings and the evidence in the Court of Common Pleas, and such proceedings were had there that the Court of Common Pleas dismissed the petition of the plaintiffs and dissolving the injunction theretofore granted; thereupon an appeal was taken to this Court by the plaintiffs and a motion

was filed by the defendant to dissolve the injunction.

The matter was heard by two of the judges of this Court at Toledo and was argued by counsel and on consideration, the judges were of the opinion that it would be better to allow the injunction to stand until the case could be heard by this Court before a full bench, and the case is now before us on the pleadings and evidence in the case.

The plaintiff in his petition sets forth that in the year 1886 on the 23rd of March, one Daniel Hiestand was the owner of certain property in Wood County, and on that date he executed a paper, commonly called an oil lease, to Charles E. Palmer, Wesley Leathers and others, wherein the party of the second part was allowed to sink a well or wells on certain portions of his land for the purpose of developing for oil or gas.

The petition further alleges that afterwards Hiestand brought a suit in the Court of Common Pleas of Wood County, on the 22nd of September, 1887, to cancel said lease and to enjoin the parties from operating under it; that an answer was filed and a hearing had in the Common Pleas Court and judgment rendered in favor of defendants; an appeal was taken from that Court to the Circuit Court, and such proceedings were had in that Court that a correction was made in the lease in certain respects, and thereupon a judgment was rendered in favor of the defendants; that thereupon Daniel Hiestand took that case to the Supreme Court of the

State of Ohio, which afterwards, upon hearing, affirmed the judgment of the Common Pleas Court.

That during this time in connection with that judgment there had been injunctions and stays of execution whereby the defendants had been prevented from reaping the fruits of the judgments that had been rendered in their favor.

Upon a mandate being received by the Common Pleas Court of the decision of the Supreme Court, the defendants, as they aver, undertook to proceed to operate under the lease; that on the 17th of July, 1889, they entered upon the premises, on the two acres, mentioned in the lease, and thereupon on the 19th of July, 1889, Hiestand commenced his second action in the Court of Common Pleas and obtained an injunction restraining them from proceeding, and thereupon the Court of Common Pleas by final decree dissolved that injunction, and thereupon said Hiestand appealed said cause to the Circuit Court of Wood County and thereby reviving and continuing in force the injunction; that on the 27th of October, 1891, Hiestand dismissed the petition; that in February, 1892, plaintiff being about to drill a well on the said two acres, Hiestand obtained another injunction and that continued in force until the 26th of March, 1892, when the same was, by order of the Court of Common Pleas, dissolved, and that on the 19th of May the cause was submitted to the Court and decided against Hiestand.

And that thereupon Hiestand ap-

pealed that cause to the Circuit Court, and in October 1893 Hiestand dismissed said action. That about the month of May 1892 at the time the injunction was dissolved, or soon after, plaintiff drilled a well on said two acres under said instrument and expended about \$1000 in so doing, which well produced gas in paying quantities and plaintiffs are in possession thereof; that Hiestand refused to receive any rental or royalty therefrom.

They also aver that in pursuance of the same provisions of the lease they, about four years ago, sunk some wells on the adjoining property at an expense of \$4000 and obtained paying wells; that these wells were drilled so near the land of Hiestand as to demonstrate the fact that oil existed in paying quantities on the land described in the petition. They then aver that they have performed each and every obligation of said contract and are still ready, able and willing to keep and perform every such obligation on their part to be kept and performed; that they have been ready to drill on the remainder of the land and that Hiestand has refused to allow them to do so.

They then aver that on October 21st, 1893, said Hiestand conveyed to the defendant Albert J. Steel the following portion of said lands, viz.: the south half of the northeast quarter of said section 18 less thirty-one and one half acres off the east end thereof and less two and one half acres in the northwest corner thereof; the portion so conveyed containing forty-six acres more or less.

That defendant acquired and took

his title to said lands subject to the aforesaid rights of the plaintiffs and with full knowledge thereof and of all the matters and things hereinbefore stated.

That defendant has, nevertheless, entered upon the lands last above described and erected thereon a derrick and placed machinery and tools and appliances thereon for the purpose of drilling thereon for oil and gas; and has commenced drilling thereon for the production of oil and gas which underlies said lands in large and valuable quantities.

That he intends to, and will, unless enjoined by the order of this court proceed to complete said well and drill other wells on said lands and remove the oil and gas therefrom to the great and irreparable damage and injury of the plaintiffs and to the great and irreparable damage and injury of their aforesaid rights and interests in said lands under the instrument aforesaid.

The lands in question are in the northeast quarter of a certain section and Daniel Hiestand owns substantially the whole of them. North of the road was the two acres that he had mentioned in this lease to the defendants—the plaintiffs therein—and lying south of the road were the forty-six acres of land which he sold to the defendant, Steel, and, upon which Steel was proceeding to sink a well when he was enjoined, and upon which is based the controversy in question.

Now we come to the lease. The

lease was executed on the 23rd of March, 1886 and provides "that the said first party for the consideration hereinafter stipulated and agreed upon, does hereby grant to the second party its successors and assigns the right to enter upon the following lands and premises now owned by said first party and situated in Bloom township, Wood County to-wit :

"A tract of two acres on the following described premises being the northeast quarter of section 18 less thirty-one and one-half acres off the east end of the south half of the northeast quarter and two and one-half acres off the west end of the south half of section 18. This lease to cover two acres on the south east corner of the northwest quarter of the northwest quarter of said section 18 for the purpose and with the exclusive right in and upon said premises to drill and develop oil, gas and other valuable substances, and the exclusive right of way to said party of the second part their successors and assigns to convey over, upon or through said premises any and all gas, oil and other valuable substances.

In consideration whereof it is agreed:

1. "If oil and gas be found and developed upon said premises in paying quantities, the said first party is to receive as his royalty a one-eighth part thereof at the well, and the said party of the second part agrees to pay the said party of the first part the market value of

said one-eighth part of the oil in tank at well or gas when marketed or delivered to a pipe line."

Then follows a stipulation in regard to allowing Hiestand to have the use of gas at his dwelling, and then it proceeds: "It is further agreed by and between the said parties their successors and assigns that this contract and the rights and privileges herein granted and conferred, shall continue and be in force for five (5) years from the date hereof, or so long as oil and gas or other valuable substances be found and developed upon said premises in paying quantities.

"It is also farther agreed that the said party of the second part their successors and assigns shall have the right and privileges of necessary roads to and from all wells or mines, developed on said premises and the right to remove all machinery, fixtures and buildings placed by them upon said premises.

"It is further agreed on the part of the party of the first part that if oil or gas be obtained by the said party of the second part or assigns, under the provisions of this contract upon said tract, or upon lands adjoining the same, then the said party of the second part shall have the right to operate the balance of said premises on the same terms as above, providing the party of the first part concludes to have the balance of the above described land operated and developed.

"In case said party of the second part, their successors and assigns, shall not commence operations upon said premises within two years

from the date thereof, then this contract may be terminated upon sixty days notice by either party."

It will be seen that the two years under this contract would terminate in March, 1888, and the five years would terminate in March, 1891.

It will be perceived that the first well that was actually sunk upon the two acres was sunk or completed in 1892, more than five years after the expiration of the five years mentioned in the contract.

It is proper perhaps to state that the defendant takes issue in regard to the allegation of the finding of oil or gas in paying quantities upon the two acres.

The case has been heard upon testimony and in the final view we take of it, we do not deem it very material to pass upon the question as to whether gas or oil, has been found in paying quantities. It looks very much as if it had not.

It appears that these plaintiffs had some arrangement with the Northwestern Ohio Natural Gas Co. that if they found oil, it was to be retained, and if they found gas it was to be turned over or conveyed in some manner to the Northwestern Ohio Natural Gas Co.

It is claimed that the well was sunk and that gas was found in paying quantities and it was stated that that well, in effect, passed into the possession of the Northwestern Ohio Natural Gas Co., and they thereupon sealed it up, and it has remained sealed until the present time, for the reason, perhaps, that it was not convenient or practical for them, without consid-

erable expense, in laying pipe, to make use of it for their purposes.

One thing is very certain, that, so far as this land is concerned, for a period of eight years the property has not been developed. That is owing, in part, to the action of Heistand, in these other cases, and in part by the action of the defendants, or their assignee, the Northwestern Ohio Natural Gas Co.

We are of the opinion, as perhaps we intimated to counsel at the time of the hearing of the motion to dissolve the injunction, that the time during which the injunction was allowed to remain against the defendants, should not be taken into account as against the defendants upon the question as to whether they had been negligent or not in sinking a well. That is, that after the expiration of that time, they should have at least a reasonable time to sink a well and ascertain whether or not oil or gas could be found in paying quantities.

We are of the opinion, too, that when a lease of this kind is made the clauses requiring the lessee to perform certain acts within a certain time are to be regarded as strongly in favor of the lessee. Certainly this party when he made this lease, expected to acquire some income from this property, and the fair intention of the parties must be, as it seems to us, that the party of the second part shall take steps to develop the land within the time stated, and they should continue to develop the property to the end that the party who makes the lease shall reap some benefit from it.

But the case, in our opinion,

does not turn upon that question and I only mention it incidentally. The real question upon which the case shall finally turn is this: When Mr. Steel bought this property, and when he examined this lease, which had been placed upon the records of the county, what was he bound to know from the lease, and of what was it notice to him, and his right under that lease as a purchaser of the property in question.

He has bought the property and there is no dispute but that he is a purchaser in good faith, and he has proceeded upon it as his property. It is claimed that by virtue of this lease, and the record of it, he had notice of all the rights of the parties who had taken a lease from Daniel Hiestand, and that he was bound, if he wanted to develop the lands which he had purchased, to give to the plaintiffs in this action, Emerine, Palmer and others, the right to operate the same upon the terms of the original lease made between Hiestand and these parties.

It will be noticed that the lease in starting out, purports to be a lease from Hiestand to these other parties, and it comes down to the paragraph where it says: "It is further agreed by and between the parties, their successors and assigns, that this contract and the rights and privileges herein granted and conferred, shall continue and be in force for five years from the date hereof, or so long as oil, gas or other valuable substances be found and developed upon said premises in paying quantities."

That is the first reference that is

made to the successors and assigns of either of the parties. There is further along a provision that the parties shall commence operation in a certain time: "It is further agreed on the part of the party of the first part that if oil or gas be obtained by the said party of the second part or assigns, under the provisions of this contract upon said tract or on lands adjoining the same, than the said party of the second part shall have the right to operate the balance of said premises on the same terms as above; providing the party of the first part concludes to have the balance of the above described land operated and developed." There is no provision there in any manner or form relating to the assign of the party of the first part.

It has been said that there has been a conveyance of the oil and the gas, under this lease to these parties, but it will be seen that whatever rights they had are conditional, and are conditioned on the fact that *the party of the first part* shall conclude to have the balance of the lands operated and developed.

But the question is, whether this option to have the land operated or not is binding upon the party who purchases the land of Hiestand, and we have come to the conclusion that it is personal with Hiestand and it does not bind his successors, and the party who purchased this land from Hiestand, took it free from the right on the part of the plaintiffs to operate it, Hiestand, while he owned it, not having elected to have it operated.

In this case he not only did not

elect to have these lands operated, but he opposed it *vi et armis*; he did it in the most impressive manner possible, *i. e.* with a pitchfork.

We think that option was personal with Hiestand and did not go beyond him; that the party when he purchased that land was bound to inquire and know only whether Hiestand had or had not elected to have the land operated under the lease. It is stated here that Hiestand never agreed that he would keep these lands forever for these parties. The Northwestern Ohio Natural Gas Co. is engaged in a business that it is fair to presume will not cease in two, three nor many years, and there is nothing to show that these parties will use the two acres of land for a long period of years, and yet, it seems to be expected that Mr. Hiestand would sit down and hold the property and allow these parties to close that well, and keep it closed, until such time as it would suit their pleasure to operate it.

It is true that some negotiations have gone on between the parties, but Hiestand has stood upon his rights, and said he did not want anything of the lessees, or anything to do with them and he would not have, and thereupon the matter has wholly failed.

We are of the opinion, as a final result of our conclusions, that the defendant, Steel, is entitled to operate this land, and the plaintiffs herein have not the right to enjoin him, and it follows that the petition of the plaintiffs herein will be dismissed at the costs of the plaintiffs, and judgment will be rendered for the defendants.

Troup & Dunn, for plaintiffs.

George H. Phelps, for defendant.

(In the Circuit Court, 8th Circuit: Hons. C. C. Baldwin, P. J.; H. J. Caldwell, and J. C. Hale, J. J.)

John Walworth, plaintiff, vs The Village of Collinwood, defendant.

An allotment made in 1872 in a township, of a part thereof, by the owners, embracing forty or fifty lots, is a town plat under the Act of March 3rd, 1831, (2 S. & C. 1482,) when made in the manner required by that Act.

The title to the streets vested in the county, and the period of limitation in favor of the owner against the title so vested is twenty-one years. The twenty-one years must have expired before suit brought.

BALDWIN, J.

In this case a plat was made by Coe, Gilbert & Shipherd, of certain lands divided into forty or fifty lots in the township of East Cleveland, now within the limits of the village of Collinwood. It was recorded on the 26th of February, 1872. It contained certain streets, and among them Beech street, running to Lake Erie. Beech street was unimproved, and continued unimproved, and for a short time inclosed, until a little short of twenty one years. The incorporation of the village of Collinwood took place in 1883. In 1892 the village undertook, in pursuance of an ordinance, to improve the street. On the 13th day of September, 1892, John Walworth, the owner of a lot that adjoined that street, brought a suit for an injunction. He had become the owner of the lot by a title which in its terms conveyed the lot by number, bounding it by the middle of the street, and naming Beech street as a street,

It is said that there was no law under which that allotment was properly made. The statute is not as clear and definite as it might be. The statute in force at that time was passed March 3rd, 1831, (2 S. & C., p 1482) and was the statute under which almost all plats were made long thereafter. But, it is said, it only authorized a plat where a corporation was to be made. The act provides that "whenever any person wishes to lay out a town within this State, they shall cause the same to be surveyed, and a plat or map thereof made by the County Surveyor of the county in which the town is situated", and then provides that "the plat or map shall particularly describe

and set forth all the streets, alleys, commons, or public grounds, and all in and out lots, or fractional lots within, adjoining, or adjacent to said town, describing the same by course, boundaries and extent".

There is no question but that, as far as the provisions of this statute were concerned, they were strictly complied with. The question is whether or not this statute applies to such an allotment. It is said that this was not a town; that a town means a body corporate. It clearly appears by this Act that it does not mean a body corporate because it contemplates that any person may lay out a town, and no man can make a body corporate all by himself. When "any person" wishes to lay out a town he can do so. The statute provides the manner in which the plat or map shall be made; that it shall be recorded, and says what effect shall be given to the plat, without any provision whatever for the formation of the municipal body. There were other statutes that provided for the formation of municipal bodies. But this statute operates completely by itself simply on the plat made by that one person or more, in due form of law, and recorded as provided.

Section 8 provides that "the plat or map, when recorded as required by this act, shall be deemed and considered in law a sufficient conveyance to vest the fee simple of all such parcel or parcels of land as are therein expressed, named, or intended for public use, in the county in which the town is situated, for the uses and purposes therein named, expressed, or intended, and for no other use or purpose whatever."

It appears very plainly to us that the Act could not possibly have meant that the dedicator should become a body corporate. The Act in regard to towns and cities (2 S. & C., p. 1493) provides for such incorporation by petition "of the inhabitants" etc., before it can be a body corporate; so that the definition of the municipal body cannot be given to the word "town," as used in this statute.

We think the construction to be given

to this statute is that it embraces such a plat as was made here, of forty or fifty lots in a township which, if settled up by forty or fifty families, would make something of a village.

Says the Century Dictionary: "The word town is used also in the sense of a collection of dwellings."

Next we are cited to an Act (2 S. & C. p. 1296 Sec. 29, now R. S., 4636) providing that a State road, unless it is improved within ten years, shall be vacated. This was not a State road.

The Act of 1853, Sec. 29, (2 S. & C., p. 1296) now Section 4668, provides that unless a county road shall be improved within seven years, that it shall revert. Although the fee of this land vested in the county, it was not such a county road as is provided for in Section 29, made such by virtue of proper proceedings under the act of which that was a part (2 S. & C., p. 1289) so that neither of these provisions apply to this case. There may be a fair ground for legislative distinction in this, that both the state and county roads were established *in invitum* by judicial proceedings, while in such a case as this the owner expressly, himself, and of his own free will, grants the land in fee to the county for the purposes named.

Now, what is the Statute of Limitations? We know of no other Statute of Limitations than that provided in the general statute of twenty-one years, and that Statute of Limitation does not apply. The twenty-one years had not run. To be sure, it was undertaken to be applied in supplemental pleadings after this suit was commenced, wherein it was alleged that the twenty-one years had then expired. But it was already alleged in the petition that the village of Collinwood had undertaken to take possession of this land, and if they did nothing more, it was simply by virtue of the injunction which was granted in this case; and it hardly needs any argument to show that a man cannot patch on the time after suit is commenced, to make out his claim under the Statute of Limitations. We think the injunction asked for by the plaintiff in this case must be

refused, and there must be a decree for the defendant.

Hon. Theodore R. Burton, for plaintiff.
T. K. Diasette, Esq., for defendant.

(In the Circuit Court, 8th Circuit; Hons. C. C. Baldwin, P. J.; H. J. Caldwell and J. C. Hale, J. J.)

Lewis V. Parker, plaintiff in error, vs
Hattie L. Parker, defendant in error.

The Court having granted the wife on her petition a divorce, and the care and custody of a minor child, has power, under Rev. Stat. 5696 and 5699 to make a provision to her for the care of the child, although the petition contained no prayer for the same or for general relief.

BALDWIN, J.

This is a petition in error to reverse a so-called judgment for alimony in a suit for divorce. The one ground upon which it is sought to be reversed is that no alimony or other relief than divorce was asked in the petition. Petitioner asked "that the marriage contract heretofore existing between said parties be set aside, annulled and held for nought, and that she be restored to all her rights as a *feme sole*."

There was one child, the fruit of this marriage and the Court gave the plaintiff the care and custody of the minor child until the farther order of the Court; and decreed that defendant "pay plaintiff the sum of \$15.00 per month for the support of their said minor child, until said daughter shall arrive at the age of eighteen years." This was payable monthly, and plaintiff was cut off from her claim of dower.

Rev. Stat. Sec. 5689 provides for what causes divorce may be granted. Rev. Stat. 5690 provides where actions for divorce or for alimony may be brought. Rev. Stat. 5696 provides that "the court shall make such order for the disposition, care of maintenance of the children, if there are any, as is just and reasonable." Rev. Stat. 5699 provides for right of wife when divorce is granted for aggression of the husband, which is the case before us. It provides, as far as it is necessary to recite, that "When a divorce is granted by reason of the aggression of the husband, the wife shall, by force of the judgment of divorce, be restored to all her lands, tenements and hereditaments not pre-

viously disposed of, and if she so desire, the Court shall restore to her any same she had before such marriage; she shall be allowed such alimony out of her husband's real and personal property as the Court deems reasonable, having due regard to the property which came to him by marriage, and the value of his real and personal estate at the time of the divorce," etc.

Sec. 5696 applies to all cases of divorce and Sec. 5699 by its terms applies to all cases "where a divorce is granted by reason of the aggression of the husband", providing some results which shall follow "by force of the judgment of divorce", others to be allowed by the Court.

The legislature, apparently, intended a wise power on the part of the Court to do what it deemed "reasonable" without too technical an adherence to the rules of pleading in ordinary civil cases.

This case itself shows the value of such discretion. There was a necessity to provide for the custody and care of the child, and excellent reason to provide for its support, a provision, indeed, which might be for the benefit of the husband as well as the wife. See *Pretzinger vs Pretzinger*, 45 O. S. 452.

We think the Court had power to make the allowance, although it was not asked in the petition. The decisions in other states are in accordance with this holding. See *Stewart on Marriage and Divorce*, Secs. 365, 366 and 367, 1 Am. & Eng. Cyclopaedia of Law, 478.

The Court may grant alimony, though not asked specifically, if the proper facts are before the Court.

Jack on vs Jackson, 1 McArthur. (D. C.) 341.

Chandler vs Chandler, 13 Ind., 492.

Prescott vs Prescott, 59 Me., 146.

Danon vs Danon, 43 Iowa, 411.

Weishaupl vs Weishaupl, 27 Wis., 621.

Wallingsford vs Wallingsford, 6 Har. & J., (Md.) 485.

Liskey vs Liskey, 2 Tenn., Ch. 1.

The decree of the Court of Common Pleas is affirmed.

Kerruish, Chapman & Kerruish, for plaintiff in error.

F. B. Skeels, for defendant in error.

Toledo Legal News.

OFFICIAL LAW JOURNAL OF LUCAS
COUNTY, OHIO.

In the matter of the designation of a daily Law Journal in Lucas County. As required by Sec. 1 of an Act passed April 14th, 1884 and amended Feb'y 25, 1886, entitled "An Act relating to the posting of court calendars and legal notices in certain counties," as amended May 9, 1894, the Judges of the Courts of Record in said County other than the Circuit Court, hereby jointly designate the TOLEDO LEGAL NEWS, a daily law journal published in said County, as the journal wherein until the further order of said judges, shall be published all the notices, advertisements, abstracts and matters and things specified or referred to in said Section 1.

Approved { GILBERT HARMON,
REUBEN C. LEMMON,
ISAAC P. PUGSLEY,
Judges of Common Pleas.
I. I. MILLAND, Probate Judge.

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SATURDAY, JULY 23, 1894.

The American Bar Association will meet at Saratoga Springs, N. Y., August 22nd, 23rd and 24th. Hon. Thomas M. Cooley, president, will deliver an address. Other speakers are Hampton L. Carson of Pennsylvania, "Great Dissenting Opinions," and Chas. Claflin Allen of Missouri on "Injunction and Organized Labor."

The measure of damages for the refusal of a bank to pay a check drawn by a depositor who has sufficient funds to meet it is held in *Bank of Commerce vs Goos (Neb.)* 23 L. R. A. 190, not to include compensation for the disgrace and pain of mind and loss of reputation resulting from the arrest and imprisonment of the depositor on a charge of giving a worthless check, and from the publication of these facts.

In this week's issue of the LEGAL News will be found an important de-

cision rendered by Judge Pugsley and pertaining to railway equipment bonds, in the case of The Adelbert College of the Western Reserve University vs The Toledo, Wabash & Western Railroad Company. The case decided is not the first one involving rights of equipment bondholders of the Wabash but the questions discussed in the present decision were not adjudicated in former suits.

A well-known lawyer on Circuit in the north of England, curious to know how a certain juryman arrived at his verdict, meeting him one day ventured to ask. "Well," replied he, "I'm a plain man, and I like to be fair to everyone. I don't go by what the witnesses say, and I don't go by what the lawyers say, and I don't go by what the judge says; but I look at the man in the dock, and I says, 'He must have done something or he wouldn't be there,' so I brings 'em all in guilty." —The Argonaut.

One of the most interesting questions of the present time, as well as an exceedingly important one, both from the legal and social or political standpoint, is the constitutional right of the legislature to restrict the freedom of contract between employers and employed. In *Leep vs St. Louis, I. M. & S. R. Co.* (Ark.) 23 L. R. A., 264, the validity of a statute of this kind is denied so far as it applies to individuals, but upheld as to corporations, which are creatures of the legislature. But even as to corporations, it is held that a statute compelling immediate payment of wages, although they would not otherwise be due, upon discharge of an employe, although so far valid, is not valid in so far as it attempts to deny the set-off or deduction of damages to the corpora-

tion on account of the employe's failure to perform his contract.

The Superior Court of Cincinnati holds in *Market Natl Bank vs Bethel et al*, reported in Court Index, July 16th, that to support an attachment upon the ground that the debtor has disposed of or is about to dispose of his property with intent to defraud his creditors, actual fraud must be shown. The Court by Hunt, J. said in part:

Nor is it enough for the attaching creditor to show that the effect of the conveyance works a fraud upon creditors, but he must show that the defendant intended to commit a fraud when he made the conveyance. Without such intent, the attachment fails, and the remedy, if any, is in equity. It is ~~true~~ that an intent to defraud may be presumed from what is done as a necessary consequence of the act itself. A mere inference, however, will not answer (21 S. C., 582; 6 Neb., 529.)

A SOCIAL WAY.—A lawyer and editor of a newspaper, indicted for selling intoxicating liquors on Sunday, but who claimed that it was done as a matter of hospitality and in a social way, received somewhat vigorous treatment by the court in a recent case. The opinion says: "This is not a case of hospitality. It could as fairly be termed a case of bribery. The defendant was not entertaining at his home, but was traveling about upon the road soliciting voters to attend the election to occur upon the following Tuesday. He sought the parties, to whom he furnished the liquor out of a bottle which he carried with him. He alighted from his wagon, went aside to the men and gave them drink, at the same time soliciting them to vote. They were very old men in their appearance and surroundings, al-

lied to the generation to which the grandfather of the defendant may have belonged, simple-minded, innocent, and living in a primitive condition, hardly believed to exist in this generation. There was nothing in common between them and the defendant, unless possibly the love of whiskey." The court adds that to say that this was furnishing the liquor in a social way is "carrying the doctrine of hospitality far beyond what is actually understood in polite society," and also suggests that the practice of using intoxicating liquors for the purpose of controlling and befuddling voters needs checking rather than encouragement.—General Digest—L. C. P. Co.

JUST WHAT WE SAID.

We have repeatedly claimed that the LEGAL NEWS, in its own success, must be an important factor in advancing the interests of Toledo. The last number of the General Digest, Lawyers Co-operative Publishing Co., says: "The TOLEDO LEGAL NEWS is another new weekly law publication, issued, as its name imports, in Toledo. It contains much of value to lawyers, especially those in the locality. These new journals are indicative of progress and enterprise to keep pace with the growth of the cities in which they originate."

This indicates the manner in which cities are measured by class publications.

U. S. District Court.

In Admiralty.

169—Ely vs The Str Shrewsbury; stipulation and bond \$11000; N. H. Swayne and A. W. Colton sureties.

Wm C. Niblack Recr. Columbia Natl Bank vs F. B. Case. Petn filed, amount claimed \$20,000, against stockholders for 75 per cent contribution. Scribner & Hurd, attys.

CIVIL RIGHTS LAW.

An interesting case arose in Justice Seagrave's Court last week wherein the Civil Rights Law was construed. The question arose in a case growing out of a refusal, by an employe on the Pastime, to permit a colored man to dance with others, white people, who were enjoying that feature of night excursions on the Pastime. The Court held, without going into the facts of the case, that the Civil Rights Law does not apply to corporations.

Hon. J. Kent Hamilton appeared for the Steamboat Co., and his brief in the case will be of interest. It is as follows:

First—Upon further examination of the statute and authorities I am satisfied that the Civil Rights Law, so called, does not apply to a corporation like the defendant in this case. The law provides:

Sec. 1. That all *persons* within the jurisdiction of said states shall be entitled to full and equal enjoyment of the accommodations, advantages, facilities and privileges of restaurants, eating places, etc.

Sec. 2 provides: "That any *person* who shall violate any of the provisions of the foregoing section by denying to any citizen, except for reasons applicable alike to all citizens of every race and color, and regardless of color or race, the full enjoyment of the accommodations in the first section enumerated, shall for every offense forfeit and pay a sum not to exceed," etc.

It will be observed that this sec-

tion limits the parties who are liable to its penalties to persons, but it doesn't extend it to corporations or partnerships.

While it is true in ordinary civil cases an artificial person like a corporation may sue and be sued, yet the statute has expressly provided for the method in which corporations should be sued. Now here is a statute which is highly penal in its operations, and by the well known principles of law it is to receive a strict construction and cannot be extended beyond the precise terms of the statute. If the legislature had intended that corporations and partnerships should come within its provisions they could easily have said so. This view is sustained by the case of *Hargo vs Meyers* 4th Reports of Cir. Court of Ohio, page 275. That was an action brought against defendants as *partners* to recover the penalties under this Civil Rights Law. The Court held in those cases that a partnership was not liable for an act done by one of the partners. The Court says on page 278:

"It is well settled that all proceedings under such a statute must be strictly construed and cannot be extended to cases not strictly within their terms." 14 O. S. 213; 20 Ohio, p. 7; 1 O. S., 15; 1 O. S., 395; 38 O. S., 659.

"The language of the statute is that any *person* who violates the statute shall be liable to its penalties. This designates the offender an individual and responsible as an individual and not as a partnership

or as a member of a partnership or corporation."

The reason and the opinion of the Court in this case seems to be decisive of the question I raise in the case at bar.

I also call the attention of the Court to the case of *State vs Cincinnati Fertilizer Company*, 24 O. S., 611, where the Court held that a person is not a corporation under the penal statutes. Welch, J., giving the opinion of the Court, page 614, says:

"I think the Court below was right. Criminal laws are to be construed strictly in favor of the accused. In its primary sense the word person means a natural person only. I know of no criminal statute in Ohio where the word has been held to apply to a corporation, etc."

If the Court will examine the Revised Statute of Ohio it will fail to find *any provision* saying that the word person shall include and mean a corporation. It is not so provided in Chapter 1, Title 1, of the statutes, vol. 1, where *definitions* are given. The only place where the word *person* is authorized to be used as other than a natural person is in Sec. 6791, being a part of the Crimes Act. There it is held that the word person may be extended beyond a natural person to designate the owner of property the subject of an offense, even though the owner is not a natural person, (e.g.) where the property of a corporation is stolen.

The Civil Rights Act is not in-

cluded in the Crimes Act, nor even if it were is The Maumee River Steamboat Co., the owner of property the subject of an offense in the case at bar. There can be no doubt that this statute under consideration is a penal statute because it provides for a penalty in a civil action and a fine in a criminal action. It was held that a statute giving a party injured a civil action for the recovery of a penalty imposed upon a public officer for charging illegal fees, is a penal act. 8 Watts & Sargent 622.

Second—A penal statute is required to be strictly construed. Endlich on Interpretation of Statutes Sec. 431.

The proposition sustained by the above authorities that this statute requires strict construction applies to the proposition I made in the argument that the company cannot be held (even if within the provisions of the statute) unless it clearly appears that the act complained of was an act of the corporation, or its managing officers.

No court in Christendom would ever hold an employer criminally responsible or liable for a penalty for an act done by its servant or agent, unless that servant or agent was clearly authorized to commit the offense complained of to the extent that he was simply the agent of, and carrying out the will of his master. It is beyond dispute in this case that the interference complained of by the plaintiff in this case was the unauthorized interference of a person who happened to

be in the employ of the boat, which was promptly disavowed by the captain the moment his attention was called to it.

Third—The above suggestions of authorities are submitted on the law questions. I adhere to my first expression in argument that it never could have been the intention of the legislature to include dancing as one of the Civil Rights secured by the great State of Ohio to its citizens.

Fourth—By the very clear weight of testimony as I argued the other day there was no preventing of this man even from dancing; he was interfered with at the beginning of the boat's trip by an unauthorized person, he was then allowed to dance and danced as much as he saw fit. He certainly has no right to complain even if his testimony is true, they stopped dancing entirely, for in that case every body else was excluded from this alleged privilege as much as he was.

Fifth—There was never any contract or agreement that this man should be allowed to dance; no testimony that any body would be allowed to dance; no testimony that that was part of the privileges. It was simply an enjoyment provided by the boat for the gay and light-hearted and no one would have a right to damages on its contract if there wasn't dancing provided.

RES ADJUDICATA.

Equipment Bonds. Consolidation. Limitation of Actions. Act of May 1, 1856, Construed. Jurisdiction of State Courts.

(Court of Common Pleas of Lucas County, Ohio.)

The Adelbert College of the Western Reserve University vs The Toledo, Wabash & Western Railway Co. et al. Decided July 16, 1894.

(1)—An action brought by one bondholder to enforce an equitable lien based on railroad equipment bonds, alleging that the suit is filed "in his own behalf as well as in behalf of all those in like interest who may come in and contribute to the expenses of and join in the prosecution of the suit" is binding only on those who are made or become parties to the suit; the parties who are not named are not parties to the suit and are not bound by the proceedings therein, unless they elect to come in and claim as such, and bear their proportion of the expenses; or unless, after having had notice and an opportunity to come in and make themselves parties, they refuse or neglect to do so.

(2)—Such a suit does not come under that provision of the Chancery practice, now adopted in the Codes of many of the States, that when the question is one of a common or general interest of many persons, or when the parties are very numerous, and it is impracticable to bring them all before the Court, one or more may sue for the benefit of all, for, by express averments of the bill, the benefit of the litigation was offered only to such other bondholders as should elect to come in and make themselves parties.

(3)—The fact that by the final decree the Court found the amount due on the entire series of bonds and declared the same a lien, and ordered the property sold, did not change the character of the suit, or affect the bondholders who were not parties, and is not, therefore, *RES ADJUDICATA*.

(4)—Even though it should be held that such suit becomes a class or representative suit by the final decree of the Court in which it was brought, although the other bondholders were not brought in, by reversal that decree becomes a nullity and by the subsequent dismissal of the bill only the complainants are bound.

(5)—Suits brought by individual bondholders in which no relief is sought or obtained in behalf of other bondholders, and in which they were not permitted to become parties, presumably because the suit was an individual one, do not constitute a bar to the subsequent suits of other bondholders of the same class. Such a defense, interposed on the ground that the first or preceding suit was a representative or class suit, is not available where the party whose property is sought to be charged with the payment of the debt allows a suit, individual in form, to proceed, without objection, and without having other bondholders of the same class made parties.

(6)—An action to enforce a lien upon the property of a consolidated railroad company, based upon an amount alleged to be due on equipment bonds issued by a constituent company, is an action not upon a liability created by statute, nor upon a written agreement, but is solely for equitable relief; and the period of limitation of such actions is ten years from the date when the cause of action accrued.

(7)—The cause of action as to each installment accrues when the same matures; the right to enforce the lien as to subsequently accruing in-

The Toledo Legal News,

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installments of interest, or as to the principal of the bonds, cannot be said to have accrued prior to the time when such installments and principal respectively matured.

8—The act of May 1, 1856, (1 S. & C., 327) authorizing a railroad company whose line shall be made to a point in another state to consolidate with the company or companies of "an adjoining state" for the purpose of forming a continuous line for the passage of cars, may as properly be construed to mean the state adjoining the state in which the first company has its line of road as the state adjoining the state in which the first company is incorporated.

9—A railroad company in possession and ownership of property acquired by consolidation, foreclosures and sales, in which the consolidation proceedings were regarded as lawful, is not in a position to question the validity of the consolidation as a defense to an action on equipment bonds issued by a constituent company.

10—A state Court has jurisdiction of an action to enforce an equitable lien upon the property of a railroad company, commenced prior to foreclosure proceedings in the Federal Court, when that Court no longer has jurisdiction and the rights of the plaintiffs in the State Court were not adjudicated in the proceedings in the Federal Court.—ED. LEGAL NEWS.)

PUGSLEY, J.

On the 1st day of November, 1862, The Toledo & Wabash Railway Co. issued and sold its equipment bonds to the amount of \$600,000, payable on May 1st, 1883, with interest at 7 per cent. per annum, payable on the 1st day of May and the 1st day of November in each year as per coupons attached. The plaintiff and the several cross-petitioners are the holders and owners of these bonds to the amount of \$243,500, and they seek in this action to enforce a lien which they claim to have on the property of said company for the payment of said bonds and the unpaid interest thereon.

The Supreme Court held in the case of *Compton vs Railway Co.*, 45 O. S. 592, that under the statute in force in 1865, when The Toledo & Wabash Ry. Co. was consolidated with certain other railroad companies, thereby forming The Toledo, Wabash & Western Railway Co., and under the stipulations contained in the consolidation agreement then executed by the constituent companies, the holders of these equipment bonds acquired a lien upon the property of The Toledo & Wabash Railway Co., and the right to have

said property applied to the payment of said bonds and interest. It must be conceded that this decision is conclusive upon this Court as to the right of the plaintiff and cross-petitioners to the relief which they ask, unless by reason of certain facts which were not involved in the Compton case it is shown that the present defendant, The Wabash Railroad Company, has a good and valid defense.

1. It is contended that the final decree of the U. S. Circuit Court for the District of Indiana in what is known as the Ham suit (which is pleaded in this case, but was not pleaded in the Compton case), is a bar to the prosecution of this action. The history of the Ham suit, so far as it is necessary to state it, is as follows: In July, 1880, in that suit, Benjamin F. Ham and seven other persons filed their amended and supplemental bill of complaint against The Wabash, St. Louis & Pacific Railway Co., and others, alleging that it is filed "in their own behalf, as well as in behalf of all those in like interest who may come in and contribute to the expenses of and join in the prosecution of the suit," and alleging the ownership by them of certain of these equipment bonds, and a default in the payment of the interest. The bonds held by complainants amounted to the sum of \$113,500, or less than one-fifth of the entire series. The prayer of the bill is that the court may adjudge and decree that the equipment bonds held by complainants shall be exchangeable for the like amount of the bonds secured by the consolidated mortgage, and that the defendant, The Wabash, St. Louis & Pacific Railway Co. pay to complainants the interest due on their bonds since November 1, 1874; and for all other and proper relief. Such proceedings were had in that suit that in

May, 1884, a final decree was rendered, finding the total amount due, both principal and interest, on the entire series of bonds, and finding that said amount is a lien upon all the property which, on the 29th day of May, 1865, was in the possession of The Toledo & Wabash Railway Co., situated in the states of Ohio and Indiana subject to the liens of four certain mortgages, and ordering the said property to be sold subject to said mortgages; and that the proceeds of the sale, after paying the costs, be brought into Court. The defendant, The Wabash, St. Louis & Pacific Railway Co., at once appealed said cause to the Supreme Court of the United States, and in May, 1885, the Supreme Court reversed the said decree, and ordered the cause to be remanded to the Circuit Court, with directions to disallow the lien claimed by the holders of the equipment bonds. *Railway Co. vs Ham*, 114 U. S. 587. Subsequently, in May, 1888, the Circuit Court vacated the said final decree, and disallowed the claim of lien set up in said suit by the holders of equipment bonds, and dismissed the bill for want of equity. (Record of Ham suit, Exhibit P., pages 130, 161, 205, 220, 221, and 232.)

The claim is that the Ham suit was a representative or class suit, and that all holders of the bonds are bound by the final judgment of dismissal. The plaintiff and cross-petitioners in this case were not any of them parties to that suit. None of them came into said suit nor appeared therein, either before or after decree. No pleading or claim setting up the bonds held by them was filed therein, and no notice was given to them by publication or otherwise to join in the prosecution of said action or to share in the fruits of the decree. The action was

brought for the benefit of only such bondholders, other than the complainants, *as should join in the prosecution of the action and contribute to the expenses thereof.*

The rule which is fairly to be derived from the authorities is, that in such an action, the parties who are not named are not parties to the suit, and are not bound by the proceedings therein, unless they elect to come in and claim as such, and bear their proportion of the expenses; or unless, after having had notice and an opportunity to come in and make themselves parties, they refuse or neglect to do so.

Pomeroy's Remedies (2d ed.) secs. 396 to 399.

2 Black on Judgments, sec 345;

O'Brien vs Browning, 49 How. (N. Y.) 109;

Story's Equity Pleadings, sec. 99.

Thonron vs R. R. Co., 38 Fed. Rep. 673.

Stevens vs Brooks, 21 Wis. 672.

Jones vs Lansing, 7 Paige 583.

Coann vs Atlanta Co., 14 Fed. Rep. 4.

Hubbell vs Warren, 8 Allen 173;

Powell vs Wright, 7 Beavan 450;

No. 48 Equity Rules U. S. Courts.

The usual practice in courts of equity, when a decree is rendered in favor of a class represented by the complainant, is to refer the cause to a master to ascertain who the other interested parties are, and to notify them to come in and set up their demands, and then, if they decline to come in, it has been held, they will be excluded from the benefit of the decree.

Johnson vs. Walters, 111 U. S. 640; *Trustees vs Beers*, 2 Black, 48, Story's Equity Pleadings, sec 99.

Some authorities were cited by counsel for the defendant which, it is claimed, sustain their position. All have been examined, but only those will be noticed which are principally relied upon.

In *Willoughby vs Chicago Junction Railway Co.* 50 N. J. Eq. 656, a suit had been brought by a stockholder of a cor-

poration in behalf of himself and all other stock-holders, to enjoin the corporation from consummating an agreement made with certain parties. The Court held that the agreement was valid, and entered a decree dismissing the bill. Subsequently this suit was brought, by another stockholder, in behalf of himself and all other stockholders, to obtain the same relief. It was held that the decree in the first suit was a bar. The grounds for this decision are, in substance (pages 664 to 667) that the complainant in such a suit does not prosecute it in his own right. He has no standing in Court as a party, except on the refusal, either express or implied, of the corporation itself to prosecute. The corporation is the real complainant, and the relief to be obtained is for the benefit of the corporation as such. There must be an unreasonable refusal on the part of the directors of the corporation to prosecute, before a stockholder can begin the action; and when there has been an adjudication at the suit of one stockholder, which is conclusive upon the corporation, the refusal of the directors to begin another suit for the same relief is not unreasonable, and hence such other suit cannot be brought by another stockholder. The principle of the decision is, that when such an action is brought by a stockholder, whether individually or as a representative of a class, it is maintained directly for the benefit of the corporation, and the final relief when obtained, belongs to the corporation, and not to the stockholder plaintiff. 3 *Pomeroy's Eq. Juris. sec. 1095.*

A similar principle is involved in the case of *Harmon vs Auditor*, 123, Ill, 122. A bill was filed by the tax-payers of a town in behalf of themselves and the other tax-payers against a railway com-

pany and the town, to enjoin the town from issuing its bonds to the company. The Court held that the town had power to issue the bonds, and dismissed the bill for want of equity. Subsequently this suit was brought by other tax-payers, praying that the bonds be declared to be null and void, and that the town officers be enjoined from collecting any taxes to pay the same from the property of the complainants and the other tax-payers. It was held that the decree in the first suit was a bar. That decree was conclusive against the town, and every taxpayer, that the bonds were valid. Every tax-payer is a real though not a nominal party to the judgment. The sixth paragraph of the syllabus shows the ground of the decision:

A judgment or decree against a county or township, or its legal representatives, is binding on all the citizens, though not parties to the suit. If the same is for a sum of money, it imposes an obligation against the citizens which they are compelled to discharge, and if for the purpose of its payment, the proper authorities levy and attempt to collect a tax, none of the citizens can, by instituting proceedings to prevent the levy or collection of the tax, dispute the validity of the judgment or relitigate any of the questions which were or could have been litigated in the original action.

Both of these cases proceed upon the ground that the parties bringing the suit represent the corporation, and the relief sought, if obtained, will belong to the corporation and not to themselves. Hence if the relief is denied, the corporation cannot relitigate the same matter in another suit brought by other parties in its behalf to obtain the same relief.

In the *Ham* case the parties bringing the suit did not represent the corporation, and sought for no relief in its behalf.

In the case of *Dewey vs St. Albans Trust Co.*, 60 Vt. 1, there were over 2400

depositors in a insolvent bank. Of these 1100 being minors and married women, claimed a preference under the statute. The receiver of the bank filed a petition asking for the direction of the court as to the distribution of the funds. Notice of the hearing on the petition was published for three weeks, and was served on the chairman of the depositors' committee. The receiver and the general creditors and those who claimed a preference were all represented at the hearing. It was decreed that there should be an equal distribution of the funds. From this decree an appeal was taken to the Supreme Court by 12 of the depositors, who claimed a preference. The case was fully argued in that Court, and the decree was affirmed. Subsequently, a new petition to obtain the same relief was filed by certain of the depositors who claimed a preference, among whom were some of those who appeared in the first case. The Court held that although the general rule is that all persons interested in the litigation should be before the Court, this case is within the exception that where the parties are so numerous as to make it impracticable or greatly inconvenient or expensive, it is sufficient if such number be joined as will fairly represent the interest of all, and that, as both classes of depositors were fairly represented in the litigation, all of them were bound by the decree. In this case the Court was asked to make an order for the distribution of a certain fund in the hands of a Receiver. The order would necessarily determine the rights of all parties interested in the fund. Notice by publication was given to all persons interested, and it was found that they were all fairly represented by those who appeared at the hearing. Where the question is one of a common or general interest of many persons, and

suit is brought by one for the benefit of all without limitation, the Court will take care that sufficient persons are before it honestly, fairly and fully, to ascertain and try the general right in contest. *Story's Eq. Plead. sec. 120.*

The Ham suit was not brought under that provision of the chancery practice now adopted in the codes of many of the states, that when the question is one of a common or general interest of many persons, or when the parties are very numerous, and it is impracticable to bring them all before the Court, one or more may sue for the benefit of all. The complainants did not profess to represent all the bondholders, but by express averments of the bill, the benefit of the litigation was offered only to such other bondholders as should elect to come in and make themselves parties, and share in the expense of the litigation. The fact that by the final decree the Court found the amount due on the entire series of bonds, and declared the same a lien, and ordered the property sold, did not change the character of the suit, nor effect the bondholders who were not parties. The proceeds of sale were ordered to be brought into Court, but no further steps were taken. The other bondholders were not made parties. They never came in and availed themselves of the benefits of the suit, nor assumed its burdens or liabilities. For these reasons, the first decree of the Circuit Court was not *res adjudicata* as between them and the defendants, and for the same reasons the final judgment of dismissal is not *res adjudicata*.

But even if the suit became a class or representative suit by the final decree, although the other bondholders were not brought in, still the same result will follow. When the final decree was reversed

and the cause remanded, the case stood in the Circuit Court as it did before trial or judgment. By the reversal the final decree became a nullity. Therefore the dismissal of the bill by the Circuit Court bound only the complainants, none of the other bondholders being parties, the same as if it had been the first and only judgment in the case. It is believed that none of the cases cited by defendant sustain a contrary conclusion.

2. It is contended that the decree in the Compton case is a bar to the prosecution of this action, and that the only remedy which the plaintiff and cross-petitioners have is under that decree, on the ground that the Compton suit is a class or representative suit.

The petition in the Compton case, which was filed in this Court on February 3rd, 1880, sets out the bonds owned by Compton, and prays that the defendant, The Wabash, St. Louis & Pacific Ry. Co. be decreed to pay the amount due to the plaintiff upon the said bonds which he holds and owns, and, in default thereof, that the property originally owned by the Toledo & Wabash Railway Co. be decreed to be sold for the payment of said bonds owned by said plaintiff. (Record of Compton suit; "Exhibit M." pages 2, 47, and 48.) In March, 1882, a final decree was rendered by this Court in favor of Compton, from which an appeal was taken to the District Court. While the cause was pending in the District Court, The Adelbert College, the plaintiff in this action, filed a motion for leave to be made a defendant, and to file answer therein, which motion was overruled. (Exhibit M., pages 131 and 133.) The cause was reserved to the Supreme Court for decision, and at its January term, 1888, the Supreme Court rendered a final

decree in favor of Compton, and remanded the cause to this Court to carry the decree into execution. By such final decree the Court found the amount due to the plaintiff Compton upon the bonds owned by him for principal and interest on the 1st day of May, 1888, to be the sum of \$339,920.40, and ordered "that the said defendants or any of them (Exhibit M., page 236) pay to said plaintiff the said sum of \$339,920.40 now due on said bonds owned by the plaintiff as aforesaid, with interest thereon to the day of payment to the plaintiff, within 10 days from the entry of this decree; and if default shall be made in such payment, then an order of sale issue for the sale as upon execution at law of all said railroad and real property, together with the structures thereon, and the fixtures and appurtenances thereunto appertaining, upon which the lien of said bonds, known as equipment bonds, is hereby declared to exist, which is situate in the state of Ohio and the jurisdiction of this Court, subject, however, and subject only, to the liens of the two mortgages hereinbefore mentioned as executed by the Toledo & Illinois Railroad Co. to the Farmers' Loan & Trust Co., and The Toledo & Wabash Railroad Co. to Edwin D. Morgan, and to the indebtedness secured by each of said mortgages; and that from the proceeds of such sale the costs of this action as taxed be paid, and the residue of such proceeds be brought into court to abide the further order herein on the footing of this decree."

After said cause had been remanded to this Court, and on the 6th day of June, 1888, a motion was filed therein to make William F. Redmond and four other persons (who are bondholders and cross-petitioners in this action) parties defend-

ant, with leave to answer, which motion was overruled on December 31st, 1888. (Common Pleas Journal 78, page 17.) On the 27th day of October, 1888, said Compton was made a party defendant in the consolidated cause of *James R. Jesup, et al. vs. the Wabash, St. Louis & Pacific Railway Co., et al.*, then pending in the Circuit Court of the United States for the Northern District of Ohio, and ordered to appear therein and set up his lien. On March 28th, 1889, he filed his answer in said consolidated cause, contesting the jurisdiction of the Court, and setting up the decree in his favor of the Supreme Court of Ohio. Such proceedings were had in said cause that, on the 21st day of July, 1892, a decree was rendered, finding that the decree of the Supreme Court of Ohio is a conclusive adjudication as to the amount, validity, and priority of said Compton's lien upon the property of The Toledo & Wabash Railway Co., and that said Compton is entitled to redeem the said property from certain prior mortgage liens thereon, amounting to the sum of \$8,540,058.09, and ordering among other things, that if said Compton shall fail to redeem the said property within the time and upon the terms provided, he shall be taxed with all the costs of the proceedings had in and about his claim; and in default of payment of said costs, execution shall issue therefor. Compton appealed from said decree to the United States Circuit Court of Appeals for the Sixth Circuit, where said cause is now pending. (Exhibit T., pages 149, 163 and 271.)

The question to be determined is, whether the Compton suit was a representative or class suit, and if it was, whether the final decree in that suit is a bar to this action. Both the District

Court and this Court refused to allow the bondholders in this action to intervene in the Compton suit, presumably upon the ground that it was an individual suit. The refusal of the Courts to grant to these bondholders any remedy in the Compton case, is, it seems sufficient reason why they should be permitted to maintain an independent suit; but assuming that they might properly have been made parties to the Compton case, or that upon the distribution of the proceeds of any sale made under the Compton decree they ought to be allowed to intervene upon terms or otherwise, is there any valid objection to this suit? In other words, is the Compton decree itself a bar to this suit? The pleadings and decree in the Compton suit show that *in form* it was an individual suit only. No relief was sought nor obtained in behalf of other bondholders. Compton was in sole control of the case, and might have dismissed it any time before decree and after decree as the case now stands, if the amount found due him is paid or his claim is discharged, no order of sale can issue. Under such circumstances, to hold that the Compton decree is itself a bar to this action would practically be a denial of all remedy to these bondholders. They have not as yet been able to come into the Compton suit. They may never be able to come into it. They ought at least to be allowed to have such an adjudication as will preserve their rights, whatever they may be.

It is said that Compton, as an individual bondholder, cannot enforce his rights under the lien separate and distinct from the rights of all the other bondholders secured by the same lien, and belonging to the same class. This may be true, but the defendants in that case made no

claim that other bondholders should be brought in. They, without objection, allowed the case to proceed as the individual suit of Compton, and all which Compton obtained was a decree finding the amount due to him on his bonds, and ordering a sale. The proceeds of sale are to be brought into Court for distribution. It is yet to be determined, in case a sale is made, how the proceeds are to be distributed.

Cases are cited which hold that when a single bondholder brings suit to foreclose a mortgage that has been given to a trustee to secure payment of a large number of bonds, his action is for the benefit of all the bondholders. There the trustee represents all the bondholders in all matters of litigation respecting their common rights, and should bring the suit. The bondholder is allowed to bring suit for the enforcement of the mortgage, only in case the trustee improperly refuses or neglects to sue; and in such case he should make the trustee a defendant, and the other bondholders may come in and prove before the master, without making themselves parties, and may not therefore bring a separate action. Here, there was no trustee. Compton represented and claimed to represent only the bonds owned by himself. He was not prohibited by the principle of these cases from bringing a separate action, and he was allowed to do so, without objection by the owners of the property sought to be charged with the payment of his debt.

Other cases are cited which hold that one bondholder cannot, by bringing an action at law upon his bonds, and obtaining judgment and levying execution, obtain a preference over other bondholders. It is submitted that these cases are not controlling, because if such is the ob-

ject or effect of the Compton suit, the objection should be made there and not here. If Compton wrongfully claims a preference under his decree, that is no answer to the claim of these bondholders to the relief to which they are entitled.

They do not claim a preference over Compton and do not admit that the Compton decree gives him a preference over them. Their rights are not fixed by the Compton decree, and they have not been allowed to come in under that decree and set up their rights. My conclusion is that the Compton decree is not a bar to the maintenance of this action.

3. It is contended that the rights of the plaintiff and cross petitioners are barred by the statute of limitations. Default occurred in the payment of the semi-annual interest coupons which fell due on May 1, 1875, and no interest has since been paid. The bonds became due on May 1, 1883, and are wholly unpaid. The petition in this case was filed April 28, 1883, and the summons, issued on the same day, was served on the Wabash, St Louis & Pacific Railway Co. on May 5th, 1883. The plaintiff claimed as owner of two of the bonds of \$500 each, and sought no relief in behalf of any other bondholder. On January 5, 1889, the cross-petitioners having been made defendants by leave of court, filed their answer and cross-petition, setting up the bonds owned by them, and asking for relief in their own behalf, and in behalf of all bondholders who may appear and unite in the action and contribute to the expenses thereof. Notice to answer said cross-petition was duly published for a large number of defendants, the first publication being on January 9th, 1889; and afterwards notice to answer said cross-petition was duly published for the remaining defendants,

the first publication being on April 17th, 1889. These defendants so notified included all the corporations and individuals who were then interested in the railroad property as owners or otherwise.

The question to be determined is, whether this action is upon an agreement in writing, and so is barred in 15 years under *Sec. 4980, R. S.*, or is upon a liability created by statute, and so is barred in six years, under *Sec. 4981, R. S.*, or is an action for relief, under *Sec. 4985, R. S.* and so is barred in 10 years. The right of the bondholders to a lien is placed by the Supreme Court upon two grounds: first, upon the ground that a lien results from the liability imposed by the statute upon the consolidated company to pay the debts of the constituent companies; and, second, independently of the statute, upon the stipulation of the consolidated agreement that the bonds should be protected by the new company; the principle being that when property is transferred upon condition that the transferee shall pay some third person a debt, the latter acquires an equitable lien on the property to the extent of the debt to be paid. If this was an action at law against the consolidated company to recover a personal judgment, it might well be claimed that it was both an action upon a liability created by statute and an action upon a written agreement. But it is not such an action. It is an action solely to enforce an equitable lien upon property in possession of the successors of the consolidated company. An equitable lien for the payment of the bonds was acquired when the consolidated agreement was made, but it could not be enforced until there was a default in the payment of the bonds. The cause of action accrued when the default occurred. While the

question is not free from difficulty, I am of the opinion that the action is not upon a liability created by statute, nor upon a written agreement, but is solely for equitable relief, and the rule is, that the period of limitation applicable to an action for equitable relief is ten years, when the statute does not specially provide any other limitation. "An action for relief not hereinbefore provided for can only be brought within ten years after the cause of action accrues," *sec. 4985, R. S.* It is an action for relief, and it is "not hereinbefore provided for." The cases in which the limitation of ten years under *Sec. 4985 R. S.* has been applied seem to sustain this view.

In *Neal vs Nash*, 23 O. S. 483, a surety in a judgment against him and his principal paid the judgment to the creditor, with the agreement that it should remain in force and be assigned to him; and having procured the assignment of the judgment, he brought an action to be subrogated to the rights of the creditor in the judgment. It was held that the statutory period of limitation applicable in such an action—it being for equitable relief only—is ten years.

In *Neilson vs Fry*, 16 O. S. 558, it is said that an action for equitable relief is limited to ten years.

In *Hawkins vs Lasley*, 40 O. S. 37, an action was brought under the statute to charge the individual property of the partners with the payment of a judgment against the partnership. It was held that it was not an action upon a liability created by statute, but was an action for relief "not hereinbefore provided for," and was barred in ten years.

In *Gray vs Kerr*, 46 O. S. 652, it is held that the cause of action in favor of one partner against his co-partner for an ac-

count accrues upon the dissolution of the partnership, and that such an action is governed by *sec. 4985 R. S.*, and can only be brought within ten years after the cause of action accrues:

In *Bryant vs Swetland*, 48 O. S. 194, it is held that an action to reform a written instrument on the ground of mistake comes within the class provided for by *sec. 4985 R. S.*, which limits the time within which the same may be commenced to ten years after the cause of action accrues.

In *Swan vs Shahan*, 1 O. C. C. R. 216, it is held that an action to enforce specific performance of a verbal contract for the transfer of real and personal property is for equitable relief, and properly comes within *sec. 4985 R. S.*

It is claimed that the right to enforce the equitable lien accrued as to the entire indebtedness on the 1st day of May, 1875, the date of the first default in the payment of interest, and that if the ten years' statute is applicable, such right was lost as to the whole indebtedness on the 1st day of May, 1885. No authorities were cited to support this claim, and I am unable to see on what principle the right to enforce the lien as to subsequently accruing installments of interest, or as to the principal of the bonds, can be said to have accrued prior to the time when such installments and principal respectively matured. The cause of action as to each installment accrued when the same matured, and was barred in ten years thereafter. Under this holding, the eight semi-annual coupons which matured prior to May 1, 1879, on each of the bonds held by the cross-petitioners, must be excluded from any recovery in this action.

4. It is contended that the consolida-

tion agreement of 1865, under which the lien of the equipment bonds is claimed, was unauthorized by law, and that this question was not raised in the Compton case. The consolidation was effected under the statute of 1856 between The Toledo & Wabash Railway Co., which issued the bonds, and three railroad companies of Illinois, thereby forming The Toledo, Wabash & Western Railway Co. The Toledo & Wabash Railway Co. was itself a consolidated company, formed in 1858 under the same statute, by a consolidation of The Toledo & Wabash Railroad Co., an Ohio corporation, and The Wabash & Western Railway Co., an Indiana corporation, thereby acquiring a continuous line of railroad from Toledo to the west line of the state of Indiana. The statute referred to is the Act of May 1, 1856. (1 S. & C. 327.) Sec. 1 is as follows:

It shall be lawful for any railroad company in this state, organized under the general or any special law, or which may hereafter be organized in this state, and whose line of road shall be made or in the process of construction, to the boundary line of the state, or to any point either in or out of this state, to consolidate its capital stock with the capital stock of any railroad in an adjoining state, the line of whose road has been made or is in the process of construction to the same point, and when the several roads so unite as to form a continuous line for the passage of cars.

It is claimed that the Illinois companies were not "in an adjoining state;" that is, they were not in a state adjoining the state of Ohio, and that therefore the consolidation of 1865 was illegal. The line of road of The Toledo & Wabash Railway Co., which was formed by consolidation under this statute, extended to "a point out of this state," namely, to a point in the state of Indiana, or to the boundary line between the states of Indiana and Illinois. The Tole-

do & Wabash Railway Co. was therefore a railroad company in this state, whose line of road was partly in the state of Indiana, and the Illinois companies were railroad companies in the state of Illinois, a state adjoining the state of Indiana. Manifestly the object of the statute was to authorize the consolidation of railroad companies whose roads form a continuous line for the passage of cars, and to accomplish that object, the words "adjoining state" may as properly be construed to mean the state adjoining the state in which the first company has its line of road as the state adjoining the state in which the first company is incorporated. I see no reason why the consolidation of 1865 was not a consolidation of a railroad company in this state, having a line of road in the state of Indiana, with a railroad company in an adjoining state.

This question as to the validity of the consolidation seems to be raised now for the first time, although the matter of these equipment bonds has been before the Courts, both Federal and State, in numerous and various forms since 1878. And the claim that the consolidation was illegal nowhere appears in this case, except in the argument of counsel. The answer of The Wabash Railroad Co. (printed record, page 236) admits that on or about the 29th day of May, 1865, the said Toledo & Wabash Railway Co. entered into an agreement of consolidation with the three Illinois railroad companies (naming them) forming by such consolidation a new company, known as The Toledo, Wabash & Western Railway Co. And it admits that said agreement for consolidation was consummated on or about the date named in said petition, but denies the effect claimed from said agreement of con-

solidation; that is, it denies that a lien was thereby created for the payment of the bonds. In the agreed statement of facts (paragraph 18, page 7), it is agreed that on or about the 29th day of May, 1865, The Toledo & Wabash Railway Co. and the three Illinois railroad companies (naming them) entered into articles of consolidation, and thereby formed The Toledo, Wabash & Western Railway Co. A copy of the articles of consolidation is attached. These were duly executed and filed, and recite a compliance with the laws of the several states of Ohio, Indiana and Illinois. Nowhere in the record is it intimated that The Toledo, Wabash & Western Railway Co. was not a corporation duly formed by consolidation under the Ohio statute. If the question as to the validity of the consolidation is properly raised upon the record in this case, it might properly have been raised upon the record in the Compton case, because in this respect the records in the two cases are alike. Whether or not the Supreme Court considered the question in the Compton case we do not know, but we do know that the court in its opinion treated the consolidation as legal and valid. Under such circumstances, this Court would not hold the consolidation to be illegal, unless clearly convinced of its illegality. It may be added that the consolidation proceedings were treated as valid by the consolidated company and all its successors. It took all the property of the constituent companies, and managed and operated the consolidated railroad for a period of years. It executed mortgages upon the same, incurred obligations, and exercised all the powers of a corporation, without question. It was itself consolidated with other railroad companies, and through such consolidation and subsequent sales and con-

solidations, the ownership and possession of the property in question have devolved upon the present Wabash Railroad Co., defendant in this case. It was at least a corporation *de facto*, entitled to all the rights and chargeable with all the liabilities of such a corporation. It recognized its liability upon the equipment bonds by regularly paying the interest thereon as it fell due for a period of nine years, until it became insolvent in 1874; and the various foreclosures, sales, and consolidations which have since taken place in the Wabash railroad system can only be sustained on the theory that the consolidation of 1865 was valid. The final decree in the consolidated cause of Jesup and others, under which the defendant claims title to the property, expressly found that the consolidation was lawfully effected.

In view of these considerations, it is submitted that the defendant is not now in a position to question its validity.

5. It is contended that under the facts in this case the Federal courts of Ohio and Indiana had exclusive jurisdiction to ascertain and determine the liens upon the property, and order its sale, and that this court is now without jurisdiction. This claim has reference to the various suits and foreclosure proceedings in the Federal Courts begun on the 27th day of May, 1884, and terminated by the final decree in the consolidated cause of James R. Jesup et al, vs The Wabash, St. Louis & Pacific Railway Co, et al, rendered on March 23d, 1889, and by the sale and delivery of the possession of the property to the purchasing committee on July 1st, 1889.

The defendant The Wabash Railroad Co. became incorporated on August 1st, 1889, and by a conveyance from the purchasers, acquired and now holds the title

to the property, and stands in the shoes of said purchasers—and in this case contests the jurisdiction of this Court. The authorities relied upon to support the claim of want of jurisdiction apply the familiar rule that the court which first takes cognizance of a controversy is entitled to retain jurisdiction to the end of the litigation, and to take possession and control of the subject matter of the investigation, to the exclusion of all interference by other courts of co-ordinate jurisdiction. There is no doubt as to the rule, but does it apply to the facts of this case? This action was begun on April 28th, 1883, before the commencement of any of the said proceedings in the Federal Courts, and has remained pending in this Court ever since. During the pendency of those proceedings, no attempt was made by any of the parties to this action to interrupt or interfere with the possession of the Receivers appointed by the Federal Courts. Neither the plaintiff nor any of the cross-petitioners, nor any one representing them, was a party to those proceedings, and their rights were in no manner adjudicated therein. The said purchasers at the foreclosure sale, and their predecessors in title, were parties to this action, and appeared therein prior to said sale, and all had knowledge at and prior thereto of the specific demands and claims which the plaintiff and cross-petitioners assert in this action. Those proceedings are ended. The Receivers are discharged, and the property is now in the possession of its owner, and has been since August, 1889; and the owner, The Wabash Railroad Co., is a party to this action. Certainly the Federal Courts now have no jurisdiction over the subject matter of this suit, and why may not the plaintiff and cross-petitioners enforce their lien, which the Supreme Court held

is available against all persons deriving title from the consolidated company of 1865? (45 O. S. 593.) It is believed that none of the authorities cited hold that this may not be done. On the contrary, in one of these cases this precise question arose, and was decided in favor of the right. I refer to the case of *Factors Co vs Murphy*, 111 U. S. 738, which was on error to the Supreme Court of Louisiana. The property of a bankrupt covered by a mortgage was sold under an order of the District Court of the United States in bankruptcy, the order being to sell the bankrupt's property free from encumbrances. The mortgagee was not a party to the bankruptcy proceeding, and subsequently brought an action in the State Court to foreclose his mortgage. It was held that the sale of real estate of a bankrupt by order of the United States Court, free from the lien of a mortgage, is invalid as to the creditor, and as to the purpose of discharging the lien, unless he is made a party to the proceeding; and that the mortgagee had the right to a decree of foreclosure. But it is claimed that the sale of the property by the State Court, even after the relinquishment of possession by the Federal Court, will give no title to the purchaser thereunder as against the holder of the title under the proceeding, had in the Federal Court; and the case is cited of *Heidritter vs Elizabeth Oil Cloth Co.*, 112 U. S. 294. That case was an action of ejectment brought by a purchaser at a sheriff's sale under a decree of a State Court, enforcing a mechanic's lien, against a purchaser at a marshal's sale under a decree of the United States Court rendered in proceedings for a violation of the Internal Revenue Laws. It was a controversy over the title. The

premises were first seized by the officers of the United States, and while they were in the possession and custody of the marshal, proceedings in the State Court were begun and prosecuted to judgment. The premises were sold under a decree of the United States Court; and possession thereof delivered to the purchaser. Afterwards they were sold by the sheriff under the judgment of the State Court. It was held that when proceedings *in rem* are commenced in a State Court, and analogous proceedings *in rem* in a United States Court against the same property, exclusive jurisdiction for the purpose of its own suit is acquired by the Court which first takes possession of the *res*, and the acts of the other Court in assuming to proceed to judgment and to dispose of the property convey no title. Although the sale under the State Court judgment was not made until the property had passed from the possession of the United States District Court, yet, the initial step on which the sheriff's proceedings depended—the commencement of the proceedings to enforce the mechanic's lien, asserting the jurisdiction and control of the State Court over the property sold, took place when the property was in the exclusive custody and control of the District Court. It was not decided whether the law applicable to the Internal Revenue proceedings authorized an absolute forfeiture of the *res*, including all interests and estates in it, so as to overreach antecedent liens, and adverse claims, or only of the actual interest of the owner charged with the violations of law at the time of the alleged offenses. If there was an absolute forfeiture, the purchaser under the decree of the United States Court obtained a good title, as that Court first acquired jurisdic-

tion. If there was a forfeiture of only the interest of the owner, the purchaser at the sale under the State Court judgment acquired no title which he could assert in an action of ejectment against the purchaser under the Federal decree, because the State Court proceedings were begun while the property was in the exclusive jurisdiction of the Federal Court, and the purchaser under the Federal decree was not a party to said proceedings.

The case is distinguishable from the case at bar. Here the State Court first acquired jurisdiction. This is certainly true as to the bonds owned by the plaintiff, and although the cross-petition was not filed until after the proceedings in the Federal Courts had been commenced, yet no adverse action was taken by the State Court while those proceedings were pending, and neither the plaintiff nor cross-petitioners were parties to those proceedings; and furthermore the purchaser at the foreclosure sale and the lienholders were all parties to the suit in the State Court before the property passed out of the jurisdiction and control of the Federal Court. Under these circumstances as the rights of the plaintiff and cross-petitioners were not adjudicated in the Federal Court, and that Court no longer has jurisdiction, there seems to be no valid objection to the power of this Court to proceed and hear and determine the matters in issue.

6. It is contended that the sole right of the plaintiff and cross-petitioners is the right to redeem, and that this redemption must be of the entire property in Ohio and Indiana covered by their lien, from the four mortgages thereon, which are conceded to be prior liens. Under this head many important and interesting questions were presented and ably dis-

cussed by counsel, with numerous citations of authorities. In the view which I take of the case, it is not necessary to consider these questions. So far as this branch of the case is concerned, the situation is not materially different from what it was when the decree of the Supreme Court of Ohio was rendered in the Compton case. It is true that the proceedings in the consolidated cause for the foreclosure of the mortgages and the sale of the property have since been taken; but as already shown, the plaintiff and cross-petitioners were not parties to those proceedings and are not bound thereby. If in 1888 Compton was entitled, as the Supreme Court found and decided, to an order for the sale of the property, the plaintiff and cross-petitioners are entitled to the same order now.

Having disposed of all of the matters of defense not set up nor involved in the Compton case, and having found that none of these matters constitute a defense, it is the duty of the Court to render the same decree which was rendered in the Compton case, and this is accordingly done.

A decree may be taken in favor of the plaintiff and cross-petitioners in accordance with this opinion, finding the amount due on the bonds, and declaring the same a lien, and ordering a sale, in all respects as was found and ordered in the Compton case.

Hon. George Hoadly and R. R. Kindade for plaintiff and cross petitioners.

Rush Taggart, Henry Crawford and A. L. Smith for The Wabash Railroad Co.

The Toledo Legal News,

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In Advance.

WAREHOUSEMEN.

(Huron County Circuit Court, April Term 1894. Present: Hon. C. S. Bentley, P. J., C. H. Scribner and G. R. Haynes, J. J.)

Alexander Gibb vs E. E. Townsend, Rec'r. etc, Error to the Court of Common Pleas of Huron County.

(The Supreme Court having held in *Pugh vs The State*, ex rel, Alfred A. Hill, that Section 5302 R. S., providing that where exceptions are not allowed and signed during the progress of the trial, the party excepting shall submit the bill of exceptions to the opposite counsel for examination not less than ten days before the expiration of the fifty days, is intended as a condition to the power of the trial judge to sign a bill of exceptions within 50 days and where that condition is not complied with, it is the duty of such judge, unless consent of opposite counsel be given, to refuse to sign and allow the bill; the second proviso of section 5302, authorizing "the trial judge to extend the time for signing not exceeding ten days beyond the expiration of the fifty, is for the convenience of the judge, to enable him to examine, sign and allow the bill, and is not intended for the purpose of submitting the bill to the opposite counsel."

Held, in the case at bar, that a bill presented on the 42nd day after the overruling of the motion for a new trial is not within the time, unless the opposite counsel consent to the using of a part of the last ten days for the examination of the bill.

2. In an action to determine the rights of parties respecting a delivery of wheat as evidenced by the following receipt:

"New London, Ohio, August 18, 1891. Received in store from A. Gibb 403 45-60 bushels of wheat which we store for 1 1/2 cent per bushel per month, and are to have at the market price when called for, unless we prefer to furnish the grain. Subject to the order of A. Gibb on the surrender of this receipt and the payment of charges. To be kept insured by us. No. 66 Dean and Lilly."

The property was subsequently destroyed by fire and the firm of Dean & Lilly being in a receiver's hands plaintiff made demand for the wheat. Judgment in favor of defendant receiver affirmed on the authority of *Chase vs Washburn*, 1st O. S. page 244. ED. LEGAL NEWS.)

SCRIBNER, J.

The case of Alexander Gibb, plaintiff in error, vs Elmer E. Townsend, Receiver of Dean & Lilly, and the New London National Bank, defendants in error, is brought here upon a petition in error from the Court of Common Pleas. Alexander Gibb, the plaintiff in error here, brought an action in the Court of Common Pleas, by leave of that Court, against one E.

E. Townsend, as Receiver of the property and effects of Dean & Lilly, a partnership formerly doing business as warehousemen in this County. The action was to recover the value of some 400 bushels of wheat which had been deposited in the warehouse in 1891 by Gibb.

The case was tried in the Court of Common Pleas and a judgment was rendered in favor of the defendant receiver. A certified transcript of the bill of entries shows that the case was heard and disposed of on the 14th of March, 1894, and final judgment rendered on that day in favor of the defendants and against the plaintiff including the costs.

The journal entry next shows that at the same term, on the 31st day of March, 1894, a motion for a new trial which had been filed within three days after the rendition of the final judgment came on for hearing and was overruled by the Court. It appears further that the plaintiff was allowed 50 days after term to file his bill of exceptions. Then follows this entry: "March term, to-wit, May 12th, 1894. Now comes Alexander Gibb and presents to the Court his certain bill of exceptions herein, which being found by the Court to be true, is allowed, signed and sealed, and on motion, is hereby made part of the record of this case."

The motion for a new trial having been overruled, on the 31st day of March, and the bill of exceptions having been presented to the Court on the 12th day of May, it appears that 42 days had intervened between the time of the

overruling of the motion for a new trial, and in presenting the bill of exception to the Court for its allowance.

The Supreme Court on the 27th day of February, 1894, in the case of D. H. Pugh, etc., vs the State on relation of Alfred A. Hall, a proceeding in error to the Circuit Court of Franklin County, held this:

"1st. The proviso of section 5302 of the Revised Statutes, 89 Ohio Laws, page 125, (quoting) 'that where exceptions are not allowed and signed during the progress of the trial, the party excepting shall submit the bill of exceptions to the opposite counsel for examination not less than ten days before the expiration of said fifty days,' (here ends the quotation,) is intended as a condition to the power of the trial judge to sign a bill of exceptions within the fifty days mentioned in sections 5298, 5301 and 5302, and where the condition is not complied with, it is the duty of such judge, unless consent of opposite counsel be given, to refuse to sign and allow the bill."

"2. The authority given by the second proviso of section 5302 to the trial judge to extend the time for signing not exceeding ten days beyond the expiration of the fifty, is for the convenience of the judge, to enable him to examine, sign and allow the bill, and is not intended to authorize such extension for the purpose of submitting the bill to opposite counsel."

This ruling appears in the Weekly

Law Bulletin for March, 5th, 1894, page 127.

Here is a case then, in which the record shows that the bill was presented to the Court on the 42nd day after the overruling of the motion for a new trial. This the Court holds is not within the time, unless the opposite counsel consent to the using of a part of the ten days—of the last ten days of the 50 days for the examination of the bill. The rule is very strictly applied by the Supreme Court in that case. The record here, fails to show us whether or not the opposite counsel was consenting to the use of any part of the last ten days of the fifty days for the purpose of examining the bill by the opposite counsel. The record is entirely silent upon this point, and a strict regard to the ruling made by the Supreme Court, in the absence of anything in the record tending to excuse the delay, would seem to require us to regard this bill of exceptions as not having been filed in time; but, notwithstanding this condition, we have thought proper to go forward and examine the record of the case and to pass upon the questions involved precisely as if no defect, if it be a defect, of the character named, existed in the record and I shall proceed briefly to state the case as presented by the record.

On the 18th of August, 1891, the plaintiff in the action below, deposited with Dean & Lilly 403 45-60 bushels of wheat. There was issued to him by Dean & Lilly a receipt of which the following is a copy:

'New London, Ohio, August 18,

1891. Received in store from A. Gibb 403 45-60 bushels of wheat which we store for $\frac{1}{2}$ cents per bushel per month, and are to have at the market price when called for unless we prefer to furnish the grain. Subject to the order of A. Gibb on the surrender of this receipt and the payment of charges. To be kept insured by us. No. 66. Dean & Lilly."

The plaintiff's petition below says said Dean & Lilly kept said wheat in store for said Gibb and subject to his order as they agreed to do until the 22nd day of August, 1892, when by order of this Court, Elmer E. Townsend was appointed receiver of the said firm of Dean & Lilly.

It appears by the testimony in the case, in the bill of exceptions that these gentlemen, Messrs. Dean & Lilly, warehousemen, received wheat as was the usual custom in such cases and mingled it with other wheat that they had in store, and sold and disposed of it, and shipped it or re-delivered it, as they might choose to do when called for.

After the appointment of the receiver in favor of Messrs. Dean & Lilly, the plaintiff, Mr. Gibb, called upon Mr. Townsend for his wheat which upon consultation with counsel, the receiver declined to respond to, and hence the bringing of this action to contest the rights as existing between these parties.

The case of *Chase against Washburn* reported in the 1st Ohio State, page 244, has long been regarded as a case settling the law arising

upon questions in cases of this kind.

In the two paragraphs of the syllabus this rule is stated:

"In case of an irregular deposit or *mutuum*, where the obligation imposed upon, the depositary or mutuary, is to re-deliver, not the specific thing furnished, but another article of the same kind and value; or, where the depositary has the option to return the specific article received, or another of the same kind and value, in either case the property passes to the depositary as fully as in a case of ordinary sale or exchange, and the risk of loss by accident follows the control or dominion over the property."

"Where a warehouseman receives wheat, and by the consent of the owner, or in accordance with the custom of trade, mixes the wheat in a common mass with the other wheat in his warehouse, and with the understanding that he is to retain or ship the same for sale on his own account, at pleasure, and, on presentation of the warehouse receipt, is either to pay the market price thereof in money, or re-deliver the wheat, or other wheat in place of it, the transaction is not a bailment, but a sale, and the property passes to the depositary, and carries with it the risk of loss by accident."

According to the doctrine here stated, where the facts exist as they are here stated, the wheat upon delivery to the warehouseman, ceases to be the wheat of the depositor, but becomes the wheat of the depositary. Now, the language

of the Court is, in such a transaction, that it is not a bailment, but a sale and the property passes to the depositary and carries with it the risk of loss by accident.

In the course of the disposition of the case upon this subject, it appears from the language of the Court that they regard the sale as one whereby the depositary is to pay for the wheat and has his election whether he will pay in money or in other wheat. The receipt issued in this case by the warehousemen contained no stipulation such as appears in this receipt,—that the warehousemen were to have the privilege of taking the wheat at the market price. It reads as follows:

"Milan, Ohio, November 5, 1847. Received in store from J. C. Washburn (by son), the following articles, to wit: Thirty bushels of wheat. H. Chase & Co."

Some verbal understanding existed between these parties at the time the wheat was delivered outside of this stipulation contained in the receipt, and the report shows the statement of the case,—that the wheat was accordingly, from time to time delivered, and in 1850, a demand was made for either the wheat or the money and both refused.

Chase then offered evidence tending to prove that his warehouse was burned on the night of the 26th, of October, 1849, and that there was then consumed in it sufficient wheat to answer all his outstanding receipts.

The destruction by fire occurred on the night of the 26th, of October, 1849, and the demand was made in

May, 1850,—the May following the fire.

Then there was evidence offered tending to prove the custom at Milan at the time of the fire, and the warehouseman gave evidence tending to show that he had abundant wheat in store at the time of the fire to meet the demand that Mr. Washburn might make for the wheat which he had placed in store.

Washburn offered rebutting evidence tending to show that Mr. Chase had not sufficient wheat in his warehouse, at the time of the fire to answer all outstanding receipts.

Upon this state of facts the counsel for Chase asked the court to charge the jury, "that the customs at Milan, if known to Washburn, in the absence of an express contract, became a part of the contract between the parties, and if the jury should find that Chase had sufficient wheat on hand at the time of the fire to answer all his outstanding receipts, that he was not liable in this action, and that neither the mingling of the wheat nor the shipment of it would make Chase liable if he had a sufficient amount on hand at the time of the fire to answer his outstanding receipts." The court refused this charge. Two of the propositions charged by the court were excepted to by the defendant below, Chase, and the giving of them was alleged as error in the court above, and these are the assignments of error:

1. Because the court charged the jury, "that if they should find that the wheat was received and put in mass with other wheat of defendant and that received of other persons, with the understanding that the wheat was to be at the disposal of the defendant, either to remain or to ship it, and with the agreement that, when the receipts were presented, the defendant would either pay the market price therefor, or re-

deliver the wheat or other wheat equal in amount and quality; then, if the jury should further find that the wheat thus left prior to the fire had all been shipped and disposed of, the defendant cannot be excused unless there was an agreement between the parties that the wheat subsequently purchased by defendant was to be substituted in place of that left by plaintiff, and to be his property."

2. Because the court charged the jury, "that where a warehouseman receives grain on deposit, with an understanding that he may if he choose dispose of it, and that he will, when demanded, return other grain or pay for it, in case of such a disposition he is bound to do the one or the other. A subsequent purchase of grain by the warehouseman, for the purpose of meeting the demand for grain thus received, would not be sufficient to vest the property in the plaintiff."

Now a paragraph or so from the opinion of the court upon this question:

"To determine which of the parties in this case shall sustain the loss of the property in question occasioned by the accident, it becomes necessary to ascertain the true nature and character of the transaction between them, and the rights created and duties imposed thereby. It was either a contract of sale, a mutuum, or a deposit. If a contract of sale, the right of property passed to the purchaser on delivery, and the article was thereafter held by him at his own risk. If a mutuum, the absolute property passed to the mutuary, it being a delivery to him for consumption or appropriation to his own use; he being bound to restore not the same thing, but other things of the same kind. Thus, it is held; that if corn, wine, money, or any other thing which is not intended to be delivered back, but only an equivalent in kind, be

lost or destroyed by accident, it is the loss of the borrower or mutuary; for it is his property; in as much as he received it for his own consumption or use, on condition that he restore the equivalent in kind. And in this class of cases, the general rule is, &c. (citing authorities). But if the transaction here was a deposit, the property remained in the bailor, and was held by the bailee at the risk of the bailor, so long as he observed the terms of the contract in so doing. But if the bailee shipped the wheat, and appropriated the same to his own use, in violation of the terms of the bailment, before the burning of his warehouse, he became liable to the bailor for the value of the property."

After proceeding to discuss at some length the question involved, the learned judge says:

"In case of a regular deposit, the bailee is bound to return the specific article deposited; but where the depository is to return another article of the same kind and value, or has an option to return the specific article, or another of the same kind and value, it is an irregular deposit or mutuum, and passes the property as fully as a case of ordinary sale or exchange. Sir William Jones says, 'It may be proper to mention the distinction between an obligation to restore the specific things, and a power or necessity of returning others of equal value. In the first case it is a regular bailment; in the second it becomes a debt.' In the latter case he considers the whole property transferred."

In another paragraph the court says: "In all this class of cases, the risk of loss by unavoidable accident attaches to the person who takes the control or dominion over the property. When, therefore, Washburn's wheat was delivered to Chase & Co., and became subject to their disposal, either to retain, or to ship

it on their own account, the property passed, and the risk of loss by accident followed the dominion over it."

The ruling in this case does not seem at any time to have been questioned in our courts. It is approved by the Supreme Court in the case of *O'Dell vs Leyda, et al.*, 46th, Ohio State, page 244 and especially pages 249 and 250. The subject is further discussed in a later case reported in the 48th, of Ohio State Reports, but nothing in the opinion delivered in that case in any degree questioned the wisdom of the ruling made in the case of *Chase vs Washburn*. The case reported in the 48th, O. S. is found on page 262.

We have examined the most of the authorities cited by the counsel for the plaintiff in error in this case bearing upon this question and we are unable to find anything contained in them that would warrant any distinction between this and the case of *Chase vs Washburn*.

In the case of *Chase vs Washburn*, it will be observed, as I have before stated, that the receipt issued is silent as to any power or control on the part of the warehouseman over the wheat; but testimony was given tending to show that, according to the custom and usage prevailing, it was the understanding had between the parties to the transaction that the warehousemen were at liberty to dispose of the wheat if they chose to do so or to return other wheat in its place. But in this case, the receipt, as it appears to us, provides the specific terms that the warehousemen may, at their option, purchase the wheat. "Received in store from A. Gibbs 403 45-60 bushels of wheat which we store for one-half cents per bushel per month, and are to have at the market price when called for, unless we prefer to furnish the grain."

It is true that there is no direct obligation assumed on the part of the warehousemen to purchase the

wheat at the market price when called for, but surely if it is competent to show an understanding outside of the receipt at the time the grain is deposited that the warehousemen may take the wheat at the market price when called for, and the courts enforce such an understanding and maintain it, allow it and enforce it, we cannot see any reason why an express stipulation of this kind contained in the receipt which the parties issued for the wheat at the time it was delivered, does not secure to them the right to purchase the wheat. It is an option, it is true, but it is an option for which a consideration is paid in the transaction itself. The parties received the wheat in store and they are to be allowed a certain commission per bushel for it,—for taking the responsibility and for handling it, but as a part of the transaction and upon the same consideration in part that the one-half per cent a bushel is allowed to be paid, they have an option secured to them of taking the wheat at the market price. The case is somewhat similar in principle to a case determined in one of the volumes of our state reports where a party releases real estate at a certain rental per annum and with the stipulation that at the end of the lease, if he desires to purchase the land at the stipulated price, he may do so, and the Supreme Court has held virtually, that such a stipulation as that is good and binding and may be enforced.

Here of course, the case is somewhat different in character. But the principle involved is the same as that which was applied, as we understand, in the case of *Chase vs Washburn*. For these reasons, the judgment of the Court of Common Pleas, will be affirmed.

A. M. Beattie, attorney for plaintiff in error.

Andrews Bros. attorneys for defendant in error.

Toledo Legal News.

OFFICIAL LAW JOURNAL OF LUCAS COUNTY, OHIO.

In the matter of the designation of a daily Law Journal in Lucas County. As required by Sec. 1 of an Act passed April 14th, 1884, and amended Feb'y 25, 1886, entitled "An Act relating to the posting of court calendars and legal notices in certain counties," as amended May 9, 1894, the Judges of the Courts of Record in said County other than the Circuit Court, hereby jointly designate the TOLEDO LEGAL NEWS, a daily law journal published in said County, as the journal wherein until the further order of said judges, shall be published all the notices, advertisements, abstracts and matters and things specified or referred to in said Section 1.

Approved { GILBERT HARMON,
REUBEN C. LEMMON,
ISAAC P. PUGSLEY,
Judges of Common Pleas.
I. I. MILLARD, Probate Judge.

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SATURDAY, AUG 4, 1894.

NOTES OF CASES.

The Superior Court of New York, General Term, enforces a stipulation not to appeal from a referee's decision, holding (opinion by Gildersleeve, J.—N. Y. Law J. 11, No. 96) that attorneys have power to enter into such a stipulation without special authority.

For trolley poles dangerously near the track, by which a passenger standing on the footboard of a street car is struck, it is held in *Elliott vs. Newport St. Ry. Co.* (R. I.) 23 L. R. A. 208, that the trolley railway company was liable, and that the passenger was not bound to be on the lookout for such poles.

That a charitable institution cannot be made to pay damages for the wrong or negligence of an officer or servant is declared in *Williamson vs. Louisville Industrial School of Reform* (Ky.) 23 L. R. A. 200, and a note to the case reviews

the prior decisions on the subject, which are not altogether agreed.

The U. S. Circuit Court, Southern District of Ohio, has decided that a statute positively prohibiting the sale of oleomargarine does not apply to original packages of the article from another statute. The opinion, by Sage, D. J., was in *Re Chas. Worthen*, reported in Vol. -4 Interstate Commerce Reports, L. C. P. Co., page 485.

The natural tendency of persons intoxicated or otherwise lacking in ability to keep out of the way, to walk upon a railroad track, is illustrated in *Anderson vs. Chicago, St Paul, M. & O. R. Co.* (Wis.) 23 L. R. A. 203, in which an intoxicated person was killed by a train while walking on a railroad trestle; and this was held to be contributory negligence. It was also held, though against the dissent of the Chief Justice, that an implied license to walk on such trestle cannot exist, because it would be contrary to public policy.

In a recent number of the L. R. A. we observe an incident which may be of interest to travelers. It is recorded in a Mississippi case, *L. N. O. and T. R. Co. vs. J. F. Patterson*, the official syllabus of which is as follows; "A railroad passenger holding a first class ticket may recover damages from the company if his request to the conductor for a seat in a first class coach is met by an explosion of profane and contemptuous wrath and he is compelled to stand, although passengers in the car are occupying more seats than they are entitled to."

This seems equitable. Standing, while riding over some of the Southern roads, would certainly seem to be all that a traveler should be obliged to endure at one time.

In sentencing two striking employees of the Santa Fe road, found guilty of contempt of Court, Judge Grosscup (reported in *Chicago L. N.*, July 28-94) said: "These men went beyond the point

of merely expressing sympathy for the strike. I do not think any man has more sympathy for laboring men than I have. I was born and raised among them and I think I know their hardships. It is perhaps natural that they should fall into the misconception when they have served one employer a considerable time that their jobs belong to them. Somebody has made what has been called an Eleventh Commandment, Take not thy brother's job; but this is not the law of the land. Employers as well as employees must be protected in their legal rights."

The judges of the Bombay upper bench accuse certain young native lawyers of their city of contempt of court, and the dispute has found its way into the columns of the *National Magazine* of Calcutta. In that land it is of course not the removal of the headgear, that is the turban—an inconvenient thing to be repeatedly doffing and donning—but the removal of the footgear which is a mark of respect when one enters the presence of a superior, and it has been the long-standing custom to wear slippers or sandals, which might easily be slipped off. But now the young lawyers are beginning to purchase patent-leather Oxford ties and seek to enter the court-rooms and try their cases without removing them. Whereupon the judges have issued an order that no "vakeel," that is, native advocate, be permitted to plead before them with his shoes on.—(Albany Law Journal.)

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The Toledo Legal News Co.,
TOLEDO, OHIO.

(Huron County Circuit Court. April Term. 1864. Present, Hons. C. S. Bentley, P. J., C. H. Scribner and G. R. Haynes, J. J.)

G. C. Sell vs. Eva J. Ernsberger. Error to Common Pleas Court of Huron County.

(1—A Justice of the Peace has authority, under proper circumstances, to send a jury to view the premises relative to which testimony is to be offered.

2—In an action to recover a penalty provided in Sec. 4715 R. S., HELD: that a jury should not have been sent to view the premises, unless it was shown that the premises were in fact in substantially the same condition that they were in at the time the alleged ditch was dug or the excavation made.

3—Such a cause of action arises when the act is performed and cannot be defeated by a subsequent transfer of the property, before suit is brought.

4—Allegations that the excavating was done willfully or maliciously are unnecessary in recovering a penalty.

5—The statute authorizes a supervisor, if, in his judgment, it is necessary, to put a ditch by the side of the road and for that purpose to excavate there, but the statute requires a replacing or a covering of the ditch sufficient so that a party shall have the same access to his property, that he had before.

6—A witness may testify as to things or conditions observed about the premises examined, but it is error to permit a witness, not being an expert, to state that that which he saw was or was not a certain thing, where that question is one at issue.—ED. LEGAL NEWS.)

HAYNES, J., (orally.)

The case of G. C. Sell, plaintiff in error, vs Eva J. Ernsberger, defendant in error, is a petition in error brought for the purpose of reversing the judgment of the Court of Common Pleas rendered upon a petition in error pending in that court to reverse the judgment upon the Justice's docket of C. W. Patchen, Justice of the Peace in Hartland-township, this county. The original action was brought by Eva J. Ernsberger to recover a penalty provided in section 4715 a of the Revised Statutes of Ohio which was passed to supplement section 4715, as appears in the 89th Ohio Laws, page 41, and which reads as follows:

"It shall be unlawful for any supervisor to excavate or make any open ditch on and along a public highway in front of any dwelling house or yard surrounding the same, or entrance thereof, or in front

of the entrance or approach to any barn on that side of the road on which the said buildings are situated, unless he forthwith puts in a sufficient under-drain and fills up the excavation to the original level except when authorized to make such open ditch at said points, by the owner of such buildings or trustees of the township. And any road supervisor violating this section shall forfeit and pay to the owner of any such buildings twenty-five dollars, to be recovered in a civil action before any justice of the peace."

Suit having been duly commenced at a certain time, a demand was made for a jury and a jury was selected and called. A trial was had which resulted in a judgment for the defendant below, the supervisor.

Thereupon, a bill of exceptions was duly taken by the plaintiff below. There are a great many points made in this case, but I shall not undertake to go very much at length into a discussion of them, as we have not time to do it. I don't think the matter is sufficiently important to justify us in taking up the time which ought to be given to other matters.

However, it is said there was no reason given by the Court of Common Pleas for its reversal of the J. P. Judgment except that it stated that there was "an abundance of errors." I will therefore go over some of them and discuss them.

The first thing that was done was this: After the jury was sworn, before any evidence was adduced, the defendant moved the court to send the jury in a body to view the premises described in the bill of particulars, to which the plaintiff objected, stating at the time that the condition and surroundings of the place excavated or dug out had been materially changed since the 20th of June, 1892, and

that any view that the jury might take at this time, that is, at the time of the trial, would not assist them any in giving a verdict; but would mislead them. The justice sustained the motion to which the plaintiff accepted at the time. It appears that he directed the constable to take the jury out to view the premises; but whether they did go or not, is not reported, but it is hinted at from time to time, and we will assume that they did go in pursuance of the order of the Court. We suppose that under the proper circumstances, it would be proper for a justice to send a jury out.

Section 6705 of the Revised Statutes governing proceedings before Justices of the Peace, provides:

"The provisions of title one, part third, of the Revised Statutes, which are in their nature applicable to the proceedings before Justices, and in respect of which no special provision is made in this title, are applicable to the proceedings before Justices of the Peace."

We find nothing in the Justice's act to reverse this. We do not see why this may not, under proper circumstances, be applicable to proceedings before Justices of the Peace, but we are inclined to the opinion that, under the circumstances, the Justice ought not to have granted this application, because it appears by statements made which are uncontradicted, that these premises were not in the condition that they were at the time the work was done; in fact, the record shows that the place had been filled up by the Supervisor himself, and the view that they would obtain would be perhaps general and might be misleading in regard to the matters in issue.

It is said here by counsel that under this act the jury go out simply to see the

premises for the purpose of applying the evidence. Well, counsel ought not to be too sure about the matter. I know of no statute upon the books that gives the Courts more trouble at the present time than this one. The question as to whether the facts that are ascertained, and the matters that are seen by a jury are to be deemed or held to be affirmative evidence, is one upon which Courts differ and the authorities differ. There has been a great deal of ink expended upon it, and the effect that is to be given to such a view when a bill of exceptions shows it to have been had. But, without discussing that, or passing upon it in any way, we simply say that we think the jury ought not to have been sent out, unless the premises were shown to be, or at least, the premises were in fact in substantially the same condition that they were at the time this alleged ditch was dug, or the excavation made.

The whole testimony is not set out, but from time to time evidence is adduced. The first exception is as to this question: "At the time this was done, (meaning the digging and excavating, or plowing and scraping by defendant,) you were not living there, so that, if any one was inconvenienced, it was not yourself, but Mr. Lewis, your hired man?" This was objected to by plaintiff. Objection overruled and admitted. The witness stated, "my husband was there and my hired man and his family and I considered it an inconvenience."

I don't see what that had to do with the issues in the case. The fact is, that the issue was simply this under the statute: Whether the Supervisor had excavated or made a ditch along a public highway in front of any dwelling house, or that house or that yard or en-

trance, and whether, having done so, he has filled it up in the manner pointed out by the statute; or, if he had omitted to so fill it, whether he had done so by the consent of the trustees. It was not claimed that he had done it by consent of the trustees, and that may as well be left out, so that the two facts to be treated are whether he had caused a ditch to be dug. It was denied that there was any ditch dug at that point. Certainly if the jury found that he had done so, and that he had not covered it up in the manner pointed out by the statute, then the cause of action accrued to the plaintiff; that is to say, the Supervisor forfeited the \$25 which the statute authorizes the then owner of the property to recover.

Now, that was all there was to be considered before that jury.

The second exception was to the question: "If there was any inconvenience from this ditch as you call it, it was to Mr. Lewis?" And that was allowed. The next question is, "Did your husband ever ask your permission to bring this suit?"

The property was in the name of the wife, it seems. That question was objected to and the witness answered: "As I have before stated, my husband was my agent to bring this suit and I thought as Mr. Sell had done wrong it ought to be righted. I thought that he had done a mean trick."

Question. "Didn't your husband say, 'I am going to sue Mr. Sell?'" This was objected to, overruled and plaintiff excepted. Answer. "I don't know as he did."

Question. "Did you make the deposit for costs in this case, or do you know who made it?" This was also objected to, overruled and exception taken. The

witness answered, "I suppose my husband made it as my agent."

Did you hire the lawyers in this case?" The witness answered, "I think my husband did as my agent."

It is sufficient to say that this is entirely immaterial and the questions ought not to have been allowed.

Then the next question is, "Did you sell this property, (meaning the premises in question) before this suit was commenced?" And she answers, "I sold it to Mr. F. D. Tucker before this suit was commenced, but not until after the 20th day of June 1892."

Question. "When did you sell it?" Answer. "I don't remember just when I sold it. I did not place it in my mind, but it was a good while after this plowing and scraping was done."

Question. "Did you own the land when you brought this suit?" Answer. "I think it was sold. We sold it to Mr. Tucker after this plowing and scraping was done as I have already said."

The point that the counsel was aiming at was this, that suit must be brought by the owner of the property at the time the suit was brought. As to that we hold that the cause of action arose at the time the action was performed and the property was vested in her,—in this plaintiff and was hers; it was not transferred to anybody.

We come now to the 10th, exception and I may as well say that these questions were all objected to.

Question. "Did you hire the lawyers in this suit? (This question was addressed to the husband.) Answer. "I was my wife's agent to bring this suit and hired them."

Question. "Did you deposit the secu-

rity for costs in this case?" Answer. "I, for my wife, put up some money."

Question. "Did you strike the jury in this case?" Answer. "Yes."

Question. "Did your wife own that land since March or April of 1893?" Answer. "She has not owned it since March or April of 1893."

For the same reason that I have already stated, this was improper.

Question. "Is it not a fact that you have been stirring up trouble in your neighborhood for 20 years or more?" Answer. "No sir, it is not a fact."

Question. "Did you not have trouble with Mr. James Park?" Answer. "I did have some trouble with him."

Question. "Have you not had trouble with Mr. Chapin?" Answer. "I once had to sue Mr. Chapin."

Question. "Did you not have trouble with Mr. S. A. Burras?" Answer. "I don't know as I did."

Question. "Did you have trouble with Mr. Morgan?" Answer. "Morgan and I may have had some difficulty."

Question. "Did you have trouble with a Mr. Wiatt?" Answer. "I don't know as I did."

Question. "Did you have trouble with Mr. Denslow?" Answer. "I did not."

Question. "Did you have trouble with Mr. Lewis?" Answer. "I did not have trouble with Mr. Lewis."

Question. "Did you have trouble with the Presbyterian Church at Olena?" Answer. "I applied to the Presbyterian Church for a letter, and it was refused me and I went to the Methodist Church without one."

We know of no light that these questions and answers could throw upon the matter at issue before the court and jury.

It certainly does not show that there was or was not any ditch excavated or dug.

We come now to the 23rd, exception—the next in order:

Question. "Did you plow or scrape out the dirt intentionally or wilfully or maliciously?" (This question is to the supervisor himself.) Answer. "No, I did not. I done it for the good of the road."

Question. "What was the condition of the road and surroundings and circumstances of the same in front of the Ernsberger property on June 20th, 1892, and shortly prior to that time?" Answer. "The road was hollowed out so that the water ran down from Ernsberger's yard and lane onto the highway. When the milk-stand stood there was a sort of hammock which had to be removed."

Question. "What effect did it, (the water) have upon the road?" Answer. "It washed it out." "I plowed and scraped it out, or had my son, Tom and Grant Olney do it, into the road. I leveled it up nicely like an onion bed. I intended to fill and level the road up right away, but I was taken sick immediately after it was done, and came very near dying. So I had to wait a week or so before doing it."

First, whether it was done maliciously or not. The reason that that question was put by counsel was that the bill of particulars stated that it had been done wilfully and maliciously. That was not necessary to an action in recovering a penalty and the whole matter should be treated as surplage and the question whether it was done maliciously should not have been brought into the case, we think.

It was a case where there could be no

punitive damages, but simply to recover \$25 penalty.

The question in regard to what was done at that point was proper to show whether there was a ditch dug there and what excavation was made, but his object and purpose in doing it was not a material matter. As I have already stated, he had the right, if, in his judgment, he thought it was necessary to do it, to put a ditch by the side of the road; he had the right to excavate there. It was his duty to do it and perhaps in the preceding section of the statute, it would require him to do it. But that is not the gist of the statute; that is not the purpose for which the change was made. The statute allows this excavation to be made,—these ditches to be dug for the water to be carried off from the roadside. What it requires to be done is, that there shall be a replacing or a covering of the ditch, either by putting in tile, or else by putting on a sufficient covering so that a party shall have the same access to his property that he had before. That is the whole force and effect of the amendment to the statute and the object and purpose of it.

It was right to have that done, unless the township trustees in their judgment should order the work to be done without the refilling, or tiling or covering.

Some questions were asked here as to the effect upon the road &c. which are not in our judgment material. The question was whether he did in fact dig a ditch there at that point, and the next question is whether he had covered it.

I come now to a series of questions that were put to parties, and there are quite a number of them, but they are of the same import and effect. They are something like this: The witness says, "I saw the

place in question where the roadside in front of the Brunsberger house had been plowed and scraped out. I saw it after it was done. I was acquainted with the surrounding ground there." Here witness described the appearance of the road and the ditch and gave all the facts connected with it at the place where the plowing and scraping was done by Sell.

The question was asked him whether there was any open ditch after the plowing and scraping had been done which was objected to and the objection overruled and exception taken.

We are clearly of the opinion that that class of testimony is not admissible in the case. That is to say, the concluding part of it. It was proper for the witness, if he saw the place at the time, or immediately after the work had been done, to state that he saw it at that point and describe it to the jury and then stop. We know of no rule of law, or any decision that authorizes a witness, not bring a professional or an expert, but in ordinary facts of this kind, to go forward and state that that which he saw was either a ditch, or was not a ditch when that is the very question at issue. That is a question for the jury to decide. After he had stated the facts he had seen and described the full particulars, the jury were to pass upon the question as to the result.

If I am correct in my recollection, that covers all the leading points, at least, all that are made in the case, and it follows from what I have said that the judgment of the Court of Common Pleas reversing the judgment of the justice will be affirmed by this court.

Andrews Bros, attorneys for plaintiff in error.

G. R. Craig, A. M. Beattie, attorneys for defendant in error.

HAMILTON COUNTY CIRCUIT COURT.

The Brilliant Novelty Billiard Table Infringement.

An Injunction Will not Lie Against Mere Misrepresentation.

1681. Rothschilds Sons' Company vs the Brunswick-Balke-Clender Company.

SHAUCK, J.

A majority of the Court think the judgment of the Superior Court should be modified to the extent that the Rothschilds Sons' Company should be restrained from publishing the matter relating to the Brilliant Novelty Billiard Table on page 83 of their catalogue. Witness Friend, at page 47 of bill, testified that to his personal knowledge he has seen tables of this style and design, with the name of Rothschilds Sons' Company on them, which were not the tables of the defendant in error, but were made by other manufactures in imitation of the defendant's table. This, we think, is clear proof of an injury to the property right of defendants. It shows the Rothschilds Sons' Company to have sold tables representing them to be the Brilliant Novelty Table, which was the defendant's table, which tables were not made by the defendants, but which were made in imitation thereof by Rothschilds. Thus the purchasers were deceived and the defendants injured, and this may have been brought about by the advertisements referred to. It was calculated to do it.

As to the other matters enjoined, the proof wholly fails to show any facts corresponding with the above.

As to the advertisement on page

80, where they give a cut of Hannah & Hogg's saloon in Chicago, it appears from the evidence of Mr. Hogg that it bears no resemblance to their saloon, the tables of which were made by the defendants.

There is not a particle of evidence that tends to show that any injury has been, or will be, caused defendants by this advertisement. It is true that it is a piece of bare-faced and wonderful lying on the part of Rothschilds Sons' & Co.; but lying does not always benefit the one engaged in it, or injure the one intended to be injured; and, as we understand the law to be, there must be something more shown, before the party is entitled to relief, than mere lying being indulged in.

To the same effect is the evidence in regard to the Manhattan Table, on page 83. There is no evidence that plaintiffs in error are selling, or offering to sell, tables made by them in imitation of defendants' table. They claim to be the originators of this table. The evidence clearly shows this to be a miserable lie, made without reason or excuse. The property right of the defendants in this table is to prevent others from selling or offering to sell tables under this name or design, which in fact were not made by defendants, but which were made by others in imitation thereof, but it does not embrace the right to prevent any one from lying about it by means of an injunction.

The same may be said in regard to the advertisement on page 84, in regard to Simonis cloth. They claim to import all the genuine

Simonis cloth imported into this country, whereas the evidence shows that they did not import any. Neither does the defendant; but the evidence shows that the defendant buys ninety per cent. of all that is imported into this country. It seems to us that this is a harmless lie in the eyes of the law, as far as defendant is concerned, although a reckless and senseless one to tell.

To the same effect are the advertisements of the Eclipse lamps and cushions. They are simply lies, made out of whole cloth, and for no apparent purpose, for the evidence fails to show that the plaintiffs are selling, have sold, or are about to sell, any of these articles as the defendant's, when in fact they are not.

Besides, the evidence of defendants is to the effect that they have virtually no competition in this country in their line of business.

Only one of the witnesses runs a billiard table bearing the mark of the plaintiffs, and all of the billiard experts who are familiar with billiard tables and makers, never heard of the plaintiffs, except as disclosed to them by the production of the plaintiff's advertisement. No damage seems to have resulted to defendant's business, and it does not seem to us very probable that it will through such shameless lying as this.

Judge Schauck thinks the judgment should stand as it is.

D. Heinsheimer and Wm. L. Avery for plaintiff in error.

Howard Douglass and Kittredge, Wilby & Simmons for the Brunswick-Balke-Collender Co.—(Court Index, July 26, 1894.)

(Third Circuit, Hancock County Circuit Court. May Term, 1894. Before Moore, C. J.; Senev and Day, J. J.)

The Meridian National Bank of Indianapolis, Indiana, vs Thomas H. McConica, William B. Ely, Walter L. Chubbuck, et al. On appeal from the Court of Common Pleas of Hancock County.

A judgment rendered against the licensee in a county where an oil well is located, said well being operated by the licensee, under what is denominated an oil lease, creates no lien in favor of the judgment creditor.

An execution issued upon a judgment against a licensee, can not be levied upon an oil well, operated by said licensee, under what are denominated oil leases, so as thereby to create a lien.

The remedy of a creditor to reach the interest of a licensee, in what are denominated oil leases, is by action under section 5464 of the Revised Statutes of Ohio.

A real estate Mortgage duly recorded, does not create a lien in favor of the mortgagee, upon the interest of a licensee in what are denominated oil leases.

Query—Are such oil leases the subject of a chattel mortgage?

As between individual and partnership creditors, there must be a PARTNERSHIP IN FACT. Otherwise the property held would be treated as individual property, unless the law of estoppel intervenes.

This partnership in fact is determined and depended upon the intention of the persons sought to be charged as partners.

SENEV, J.

This action as presented by the facts as alleged in the pleadings, is one for the marshalling of various liens; the liens as claimed growing out of the acts of the parties as well as by operation of law. Incidentally to the establishment of the various liens, and upon which, if they have any validity in law the liens depend, is the question whether the property, or the money arising from the sale of the property, is the property of a co-partnership firm, or is the individual property of the different members composing the firm. While these are probably the only issues tendered by the pleadings, the undisputed material facts in the case, as disclosed by the

evidence, presents another question arising from equitable principles; not depending upon the doctrine of liens, as known to the law, but upon the right of partnership creditors to be first paid out of the partnership property or funds.

From the kind and character of the property, whether it is co-partnership property or not, from the kind and character of the various claim liens, whether they are liens or not, from the lack of averments in the pleading, from the lack of testimony in the case, it has caused the Court considerable trouble to arrive at a conclusion, so that exact justice may be done between the parties, that justice to be measured alone by legal and equitable principles. From what had been disclosed upon the trial, it appears to a majority of the Court there are other undisclosed facts which, if disclosed, might change the rights of the parties.

Be that as it may it is the duty of the Court to dispose of the case as it is, and not as it might have been.

On the 20th of June, 1890, A. R. Lafferty and E. A. Townley granted unto defendant, W. B. Ely, his heirs or assigns, for a valuable consideration, all the oil and gas in and under certain described premises, together with the exclusive right to enter thereon for the purpose of drilling and operating for oil, gas or water; to erect, maintain and remove all structures, pipe lines necessary for the production and storage of oil, gas or water. upon the following terms:

W. B. Ely agrees to drill a well

upon said premises within thirty-seven days from this date; should Ely fail to so drill, then this instrument to be null and void. Should oil be found in paying quantities upon the premises, Ely agrees to deliver to Lafferty and Townley, one-sixth part of all the oil produced and saved from said premises. Should any well or wells produce two hundred or more barrels a day, then Lafferty and Townley should receive one-third of the oil thus produced. All rights under this agreement shall end in twelve years from this date, or as soon as Ely, or his heirs or assigns, have abandoned or cease to operate the same, for a period of six months (other conditions are mentioned in this instrument that is not necessary to notice.)

On the 26th day of August, 1890, the said W. B. Ely, for a valuable consideration, assigned and transferred, by a written endorsement endorsed thereon, one-third of his interest in said written instrument to the defendant, T. H. McConica, and one-third of his interest in said written instrument, to the defendant, W. B. Chubbuck.

The instrument with the endorsements thereon, was duly recorded by the recorder of Hancock County, Ohio, in a book kept in the Recorder's office for that purpose.

Upon the threshold of the case, and upon which must be built the respective rights of the different parties herein, is the determination of the legal character of this written instrument.

This Court held in the case of *Harrington, et al, vs Wood*, 6th C.

C. Report, page 330, that the construction to be given to this class of instruments was:

"That they are not strictly a lease, but a license coupled with a conditional grant, conveying the grantor's interest in a gas well."

The Sixth Circuit Court held, in the case of *The Ohio Oil Co., vs The Toledo, Findlay and Springfield Railroad Company*, reported in the *Fourth C. C. Reports*, page 215: "That these leases are in the nature of an incorporeal hereditament; that strictly speaking, it is not a right in the land as such, but a right to enter upon the land, to sink its wells, and to take from underneath the soil, such oil as it may find; to take it from the land, and to render a portion of it to the land owner; the remainder to become its own, to dispose of it as it sees fit."

The Supreme Court of Ohio in the case of *Brick Company vs Pond*, 38 O. S. Page 65 held as follows: "A by an agreement in writing, leased to B. all the clay that is good No. 1 fire clay on his land described, for a term of three years, subject to the condition that B. shall mine, or cause to be mined, or pay for not less than 2,000 tons of clay, every year, and shall pay therefor twenty-five cents per ton for every ton of clay monthly as it is taken away;

"Held, that this was a *contract*, which gave B. the exclusive right to mine and remove all the good No. 1 fire clay that was on the land, and not a *lease* of the land itself."

The only difference between the case at bar, and the one cited from

38 O. S. is, in the case at bar, the contract was for all the oil contained in the land; in the 38th O. S. it is for all the fire clay contained in the land of a certain quality. We quote from the opinion of Johnson, Judge, as found in 38th O. S., page 71:

"The exclusive right to possession of the land, as far as it was necessary to mine and remove such clay was granted. This was not an exclusive possession of the whole tract, but only for mining purposes. The ownership of the land, with the right to the possession of the same, subject only to the right of possession for the purpose of mining and removing the clay, was in the owner. This was, therefore, a contract, for the privilege of mining and removing the kind of fire clay specified, as distinguished from a lease of the land."

Does the fact that it was clay, instead of oil, change the character of its mining properties? It was held in 110 Penn., page 317, as follows:

"Petroleum, it is a mineral substance, obtained from the earth, by a process of mining, and lands from which it is obtained, may with propriety, be called mining lands."

From these authorities it must be held that the written instrument in the case at bar, is not a lease of the land, but simply a contract, coupled with the license or grant, to obtain possession of the land, for the purpose of the contract. Its sole and only reference to the land, is the license to take possession.

On the 13th day of April, 1891, the defendants, Thomas H. Mc-

Conica, Wm. B. Ely and W. L. Chubbuck, executed and delivered to Sylvester Finch, David E. Batchley and A. J. Ferrell, partners as S. M. Finch & Co., a written instrument, whereby they granted, sold, assigned, transferred and conveyed to Finch & Co. all their interests in the written instrument executed by A. R. Lafferty and E. A. Townley, to Wm. B. Ely, on the 20th day of June, 1890, as before stated, together with three derricks, three oil wells complete including casing, rods and everything going to make up a complete outfit to said wells, including three stationary steam-engines, two boilers, four 250 bbl. tanks, 3,500 ft. of steam pipe line, and all connections and fittings and all other personal property, belonging to said grantors, now on the said premises hereinbefore described; also one derrick, one boiler, one engine, one string tubing (1,250 ft.) one string casing (420 ft.); one carpenter rig complete, one strong sucker rod, and one 250 bbl. tank.

The condition contained in said written instrument or grant was:

"That whereas the said Thomas H. McConica, William B. Ely and Walter L. Chubbuck, have, as partners under the firm name of McConica, Ely and Chubbuck, executed in such firm name, and delivered to said S. M. Finch & Co. their certain promissory note, dated April 11, 1891, in the sum of Two Thousand Dollars, due and payable on or before the 11th day of April, 1892, and have further agreed that they will operate all said wells in a safe and prudent manner, and at the end

of each month, render a just account, of the expenses of such operation, of said wells, including removing property, and drilling said wells, and deduct said expense which shall be paid to them, all the balance or net earnings of said wells, shall be retained by grantees herein, and applied to the payment and liquidation of said note, and shall be credited on the same each month, as said payments are made. The oil shall be run to the credit of the grantee. Now if the said McConica, Ely and Chubbuck, or any of them, their heirs or assigns, shall truly pay or cause to be paid, said promissory note, with interest when the same shall become due and payable, and shall keep and perform the covenants and agreements above contained, on their part to be perform and kept, according to the intent and meaning thereof, then this mortgage shall be void; otherwise to be and remain in full force and virtue in law."

This instrument in writing, was duly recorded as a real estate mortgage, and was duly filed and recorded as a chattel mortgage. The note mentioned and described in this instrument in writing, before its maturity, was duly assigned and transferred by the said S. M. Finch & Co. to the Meridian National Bank, which it now holds and asks that the instrument in writing, securing it, be foreclosed.

After the execution and delivery of this instrument, to Finch & Co., Finch & Co. took possession of the premises, and these various chattels, operated the

oil wells upon said premises, and received in money from the sale of the products of these wells, more than enough to pay said note, after deducting the expense incidental to the operating of said wells.

The money realized by Finch & Co. in the operation of said wells, was paid by them in a great part to the creditors of the firm of McConica, Ely and Chubbuck; only a small part being paid upon this note. The payment was made with the knowledge and under the express direction of McConica, Ely and Chubbuck.

After this action was commenced, and after this money was realized, by Finch & Co. the Court of Common Pleas appointed a receiver, who, since his appointment, has been operating said wells, and has in his hands, by virtue of said operation, a large sum of money for distribution.

The Meridian National Bank, under this state of facts, claim a lien upon these oil wells, the chattels connected therewith, and the proceeds arising from the sale of the oil, made by the receiver; have they such a lien?

So far as this security is concerned, The Meridian National Bank, stands in the shoes of Finch & Co. If Finch & Co. could not claim a lien by virtue of these facts, neither can The Meridian National Bank. As we have seen from the case cited in the 28th O. S., the interest of Thomas H. McConica, Wm. B. Ely and Walter L. Chubbuck, is an interest in the contract, and not an interest in the land. So

that this instrument in writing, recorded as a real estate mortgage, created no lien. Query, can this contract be the subject of a chattel mortgage, so as to create a lien? If it can, the condition of it provides that when, with the operation of the oil wells, after deducting expenses, enough money is realized to satisfy this note, the mortgage is void. Enough was realized, hence the security is void by its terms, unless the direction of the firm of McConica, Ely & Chubbuck apply the money thus realized to other firm debts, changes it. The security is that of Thomas H. McConica, Wm. B. Ely and Walter L. Chubbuck and not the security of the firm of McConica, Ely & Chubbuck. When Finch & Co. consented and applied the money thus realized to other firm creditors, in preference to applying it to their own security, in equity they waived or released their security, upon the plain principal of equity, that by their act, it tends to defeat the other creditors. At this point another equitable principle may be pertinent, although not pleaded, and that is this, the doctrine of subrogation. The claims that were paid by Finch & Co. in preference to their own, were the claims of McElwaine & Co., and Solomon Funk, which claims were for materials furnished, for these oil wells, and which is claimed were prior liens to this lien of Finch & Co., by reason of McElwaine & Co. and Solomon Funk, perfecting a mechanic's lien under the Statutes of Ohio. The question thus arises, had they valid mechanic's liens?

In the case of McElwaine & Co.

the first item of account is dated Aug. 29, 1890, \$475. The second, third and fourth items of account are dated Dec. 11th, \$205.55; Dec. 13, \$210.31; Dec. 14, \$43.97; Dec. 30, \$183.31; Jan. 10, 1891, \$——. The lien was filed for record May 7th, so all these items were furnished with the exception of the last item, more than four months prior to the filing of the same for record.

In the case of Solomon Funk, the same condition exists.

On account of the date at which these items were furnished, the date of the filing of the lien, does the fact that one of the items was furnished within the four months, preserve the lien, as to the other items. We think not.

We cite the case of *Choteau et al. vs Thompson & Campbell*, 2 O. S., page 114. A part of the syllabus of the case reads:

"But where they are furnished for different purposes (materials) or where there are intervals of time in the account, so long that it can not with propriety be called one account, there is not, in the absence of an entire contract, a lien for the whole from the date of the first article furnished. The items in such case, will be regarded as forming one, two or more distinct accounts."

So, we hold (a majority of the Court,) that the Meridian National Bank has no lien so far as the lien is claimed, by virtue of the mortgage described in the petition.

On the 29th day of April, 1891, the firm of Shaw, Kendall & Co.,

recovered a judgment before a J. P. against the firm of McConica, Ely & Chubbuck, and on the 6th day of May, 1891, they caused a transcript of said judgment to be filed with the Clerk of the Court, which judgment was assigned to the defendant, The Buckeye Supply Co.

On the 13th day of July, 1891, The Buckeye Supply Co. obtained a judgment in the Court of Common Pleas of Hancock Co., Ohio, against the defendants, Thomas H. McConica, William B. Ely and Walter L. Chubbuck, as partners under the firm name of McConica, Ely & Chubbuck.

On the 6th day of May, 1891, the Buckeye Oil-Well Supply Co. recovered a judgment against McKinnis, McConica & Co. before a J. P. and on the 11th day of June, 1891, they caused a transcript to be filed with the Clerk of the Court, that the defendant, Thomas McConica, was a member of said firm of McKinnis, McConica & Co. and that the Buckeye Supply Co. is the owner of said judgment.

On the 13th day of July, 1891, The Buckeye Oil Well Supply Co. recovered a judgment against the partnership of McConica, Ely & Bicknell, by the consideration of the Court of Common Pleas, of Hancock County, Ohio; that the Buckeye Supply Co. is the owner of said judgment; that the defendant, Thomas H. McConica, was a member of said partnership firm of McConica, Ely & Bicknell,

Such, in affect, is the claim lien of The Buckeye Supply Co. Do these facts create a lien so far as

the property or money in question is concerned? They are either the property of T. H. McConica, Wm. B. Ely and Walter L. Chubbuck as individuals, or the property or monies of the co-partnership firm of McConica, Ely & Chubbuck, and a judgment against the firm of McKinnis, McConica & Co. and against the firm of McConica, Ely & Bicknell, does not create a lien upon the property of the firm of McConica, Ely & Chubbuck, or the individual members of this firm; although it may be that a member of the firm, is common to all the firm.

As to the judgments against the firm of McConica, Ely & Chubbuck, they are a lien without levy upon the real estate of the firm in the county. Nothing else, and as we have seen, the firm of McConica, Ely & Chubbuck, or the individuals composing the firm, are not the owners of any real estate; hence we hold that the Buckeye Supply Co. has no lien upon the property, or proceeds from the property by virtue of this judgment lien.

For the reasons heretofore given, the facts pleaded in the answer and cross-petition of Solomon Eunk create no lien in his favor against the property in controversy.

As to the facts alleged in the answer of S. M. Finch other than the facts alleged in which he asks that the payments that he made to McElwaine & Co. and Funk be ratified and approved by the Court, to-wit; for services rendered while he had charge of the property: creates no lien against the property

or its proceeds from the fact alone of such services.

Adams Bro's. & Co. claim a lien from the following facts:

That on the 22nd day of May, 1891, they recovered a judgment before a J. P. against the partnership firm of McConica, Ely & Chubbuck, that on the 19th day of Nov., 1891, they filed a transcript of said judgment with the Clerk of the Court; that on the 3th day of May, 1891, they recovered three several judgments against the defendant, McConica, Ely & Chubbuck, as partners, before a J. P. That on Sept. 19, 1891, they filed a transcript of each of said judgments with the Clerk of the Court; that on the 13th day of April, 1892, they caused executions to issue and the same were levied upon all the premises, and all the property, both real and personal, described in the petition,

That on the 10th day of May, 1892, they recovered a judgment against the defendants, Thomas H. McConica, and Wm. B. Ely, by the consideration of the Court of Common Pleas, of Hancock County; they caused an execution to be issued and levied upon McConica's undivided interest in said property, and upon Wm. B. Ely's undivided interest in said property.

The difference in this claim lien of Adams Bros. & Co. and the Buckeye Supply Co. is this:

In Adams Bros. & Co. there was a levy made; in the Supply Co. there was no levy. Does this dif-

feren create a lien in favor of Adams Bros. & Co?

Section 5375 of the Revised Statutes provides:

"Lands and tenements within the county, where the judgment is entered, shall be bound for the satisfaction thereof, from the first day of the term, at which judgment is rendered, but judgments by confession, and judgments rendered at the same term, at which the action is commenced, shall bind such land only from the day on which such judgments are rendered, and all other land as well as goods and chattels of the debtor, shall be bound from the time that they are seized in execution."

Adams Bros & Co. have no lien by virtue of their levy upon the proceeds arising from the sale of oil in the hands of the receiver, because this oil in the hands of the receiver, could not be seized in execution; being in the hands of the receiver, it was already in the possession of the Court. They have no lien by virtue of their levy, upon the oil wells and the products thereof, because they are held under a contract, and are not lands and tenements; and the contractual rights under the contract, are not goods and chattels, hence could not be seized in execution. As to the derricks and other chattel property connected with the oil wells, a lien could be created, by seizure upon execution, provided in the Adams Bros. & Co. case, these derricks and other chattels were property of the firm of McConica, Ely & Chubbuck, or the property

of Thomas H. McConica and Wm. B. Ely, against whom the executions were issued.

The question may be asked how will you subject this oil lease or contract of McConica, Ely & Chubbuck, to the payment of their debts; whether it is the property of the firm, or the property of the individuals composing the firm? This is provided for by Section 5464 of the Revised Statutes which provides:

"When a judgment debtor has not personal or real property subject to levy on execution, sufficient to satisfy the judgment, any equitable interest which he has in real estate, as mortgagor, mortgagee, or otherwise, or any interest he has in any banking, turnpike, bridge or other stock company, or in any money, contract, claim or chose in action, due or to become due, to him or in any judgment or order, or any money, goods or effects, which he has in the possession of any person or body politic, or corporate, shall be subject to the payment of the judgment by action."

So we hold that Adams Bros. & Co. have no lien upon the property, or moneys in controversy, by virtue of their judgment and levy, excepting the derrick and chattels connected with the wells, and this dependent upon whether these derricks and chattels were the property of the firm of McConica, Ely & Chubbuck, or Thos. H. McConica and Wm. B. Fly, at the time of the seizure upon execution.

The Farmers' National Bank of

Findlay, Ohio, claim a lien from the following facts:

On the 6th day of February, 1892, the Bank recovered a judgment against the defendant Thos. H. McConica, by the consideration of the Court of Common Pleas, of Hancock County, Ohio; execution was duly issued upon the judgment, and levied upon the property described in the petition.

On the 6th day of February, 1892, another judgment was rendered, similar to the above, excepting amount, execution issued, and levy made.

On the 2nd day of March, 1892, the Bank recovered a judgment against the defendant, W. L. Chubbuck, by the consideration of the Court of Common Pleas, of Hancock County, Ohio, execution issued and levy made upon all the property in the petition described.

For the reasons given in Adams Bros. & Co. claim, this Bank has no lien by virtue of its judgment and levy, excepting the derrick and chattels connected with the wells, and this dependent upon whether these derricks and chattels were the property of the defendants, Thos. H. McConica and W. L. Chubbuck, at the time of the seizure upon execution.

On the 20th day of April, 1891, the defendant, Wm. B. Ely, sold and assigned his one-third interest in the oil lease or contract (made by Lafferty and Townley) to one Wm. S. Ely, together with his interest in all oil wells, lines, tanks

and machinery now on or pertaining to said lease.

This assignment was duly entered of record upon the same day; although this transfer and sale is absolute upon its face, the pleadings aver it was a pledge or mortgage, given by Wm. B. Ely to Wm. S. Ely to secure him on account of his suretyship to Wm. B. Ely.

This is not a claim *in rem*, but an absolute sale of an interest in all the property in controversy, which carries with it the proceeds in the hands of the receiver, produced from that interest, dependent alone upon the fact whether Wm. B. Ely, at the time owned in his individual right, this interest he sold.

Wm. S. Ely further claims, by virtue of his purchase from Wm. B. Ely, that he is entitled to an accounting from the firm of Finch & Co. for the proceeds of the oil sold by them, in excess of the sum of money that was required to pay the note now held by the Meridian National bank. The product of the oil wells that were placed in the hands of Finch & Co. by the individuals composing the firm of McConica, Ely & Chubbuck, by virtue of the so-called chattel mortgage, was first a pledge by the individuals composing this firm, to the extent of the payment of this note. In this relation they were the pledgees of the property of product. And as such were responsible in that relation. They, still retaining possession of the property and its product, after this relation terminated and being put in possession originally by the individuals composing the

firm of McConica, Ely & Chubbuck, which was known to Wm. S. Ely, after the relation of pledgee terminated, they then bore the relation to the individuals composing the firm of McConica, Ely & Chubbuck, of agent, and paying the money out under their direction, and Wm. S. Ely permitting it to be done, he is now estopped from claiming that Finch & Co. should account to him; his accounting for this transaction, if any he has, must be with Wm. B. Ely, from whom he purchased.

The answer of Isaac Davis, claims an interest in the property, and the proceeds through an assignment by Wm. S. Ely to him of the undivided one-third interest, that he obtained from Wm. S. Ely; to protect Davis, in his suretyship for Wm. S. Ely.

His interest depends, first—whether Wm. S. Ely has any interest, and second—by his pleading, it is very doubtful if he pleads facts sufficient to create any interest; it might be supplied by evidence, but we have none.

J. L. Walcott, claims a lien from the following facts:

"By virtue of the same judgments set forth in the answer and cross-petition of the Buckeye Supply Co. As before stated, these judgments constitute no lien. In addition to this, on the 29th day of October, 1891, for the purpose of securing the payment of these judgments, Thos. H. McConica assigned and transferred to Walcott, all his interest in the leasehold and property, connected therewith, mentioned and described in the petition. The

transfer was made to Walcott, he being the Treasurer of the Buckeye Supply Co. for the use and benefit of the Buckeye Supply Co. and no other party. That he, Walcott, is the sole owner of the interest of the said Thos. H. McConica in the property subject to the amount that may be required to pay the partnership debts of the firm of McConica, Ely & Chubbuck.

This pleading of facts constitute no cause of action. For even if McConica was the absolute owner of the interest he sold, the sale inured to the benefit of the Buckeye Supply Co. and Walcott, the answering defendant has no interest in it.

As we have seen, none of the parties to the action have any liens upon this license or contract, which carries with it the oil wells, and the product therefrom, by virtue of any mortgage, by virtue of any judgment or levies, or by virtue of any mechanic's lien.

Under the pleadings and the evidence introduced without objection, we treat the action as two-fold; first—the marshaling of liens as to the derrick and other chattels connected with the wells, and second, as to the oil wells, and products therefrom, as an action under section 5464, of the Revised Statutes, to subject the right of the debtor under this license or contract, to the payment of his or their debts. Thus treating the case as to the oil wells and the products therefrom, the interest in the proceeds thereof, are determined upon equitable principles. All creditors of a

class share pro-rata, without priority; partnership assets are first subject to the payment of partnership debts; individual assets, are first subject to the payment of individual debts.

If we concede that the co-partnership firm of McConica, Ely & Chubbuck own this license or contract, together with all the chattels connected therewith, at the start, on the 20th day of April, 1891, a member of the firm, Wm. B. Ely, sold his interest to Wm. S. Ely. This at common law, dissolved the firm. We have no data, either in the pleadings or evidence, to determine the substantial effect of it.

If the law governing mining properties is applicable to the drilling for oil, and which some Courts of recognized distinction and ability hold—then a co-partnership firm for drilling for oil, is governed by rules of law, entirely different from rules of law governing an ordinary partnership. We have no data either in the pleadings or evidence to make the application of the law governing mining.

So the question is, is the property in controversy the property of the co-partnership firm of McConica, Ely & Chubbuck, or is it the individual property of Thos. H. McConica, Wm. B. Ely and W. L. Chubbuck. So far as the respective rights of creditors are concerned, to hold in partnership property, there must be a partnership *in fact*. This partnership in fact, is determined and depends upon the intention of the parties sought to be charged as partners. This inten-

tion is formed by the acts of the parties. What were those acts?

This license or contract, appears of record (and the law of Ohio requires it to be recorded,) in the name of Thos. H. McConica $\frac{1}{3}$, Wm. B. Ely $\frac{1}{3}$, and W. L. Chubbuck $\frac{1}{3}$.

On the 13th day of April, 1891, Thos. H. McConica, Wm. B. Ely and Walter L. Chubbuck, as grantors, conveyed to S. M. Finch & Co. all the property in controversy, to secure a note executed by the firm of McConica, Ely & Chubbuck. This instrument was recorded as a real estate mortgage, and chattel mortgage, and in it they claimed to own the property as individuals. It will be noticed that it is not a conveyance by the firm.

On the same day, Thomas H. McConica, Wm. B. Ely and Walter L. Chubbuck, grantors, conveyed to S. M. Finch & Co. all the property in controversy, to secure another note executed by the firm of McConica, Ely & Chubbuck. This instrument was recorded as a real estate mortgage and chattel mortgage, and in it they claim to own the property as individuals.

It will be noticed that it is not a conveyance by the firm.

On April 20, 1891, Wm. B. Ely, transferred and sold to Wm. S. Ely, his one-third interest in all the property in controversy. This was entered of record as the law required.

On April 20, 1891, Thos. H. McConica, transferred and sold to David T. Davis, an equal undivided one-third in all the property in

controversy. This was entered of record as the law required.

On April 22, 1891, W. L. Chubbuck, transferred and assigned to J. B. McElwaine & Co. the undivided one-third interest in all the property in controversy. This was entered as the law required.

Wm. B. Ely testifies:

"We agreed to drill wells on it and develop it. Each one of us to pay our third interest in the fund, and draw our oil separately. Each one raising his one third. The oil was sold to the Buckeye Pipe Line Co. on division run orders. Each one drew his oil when he wanted it. During the time that we were putting down the wells, each one of us did pay each his own part as long as each could from his own resources. No, sir, not considered a firm. When we started it was the understanding of all of us, especially understanding there would be no firm about it.

"Each one would draw his oil. I kept the books in each one's individually, and made statements to each one individually. The money in bank came this way: I would ask McConica or Chubbuck, they would give me a check; they had their own bank account, and I asked them to give me a check. If we had any notes or bills, or anything of the kind, we had to pay, they would give me a check; sometimes for a third of the note, or something that way. Sometimes they would turn over what they had received from the Buckeye Pipe Line Co. for oil sold. They would turn me over

that check, which I would put in the bank, and check it out."

It was conceded on the trial by all parties, that each one of the three received their own orders, and sold their oil separately.

Mr. Chubbuck testifies:

"It was understood that we would take leases together, and become partners in the business and operate. (This amounts to nothing; his understanding is nothing; facts upon which he based his understanding is what proves something.) We deposited sometimes individually to the firm credit, and sometimes we checked out the individuals we owed for firm labor. Whenever there was any bills to be paid, or any money necessary to carry on the business, each one undertook to get one-third of it from his own resources, if there was no company fund in the bank. Each one was to get his own oil, each one was to draw his own oil."

Thos. H. McConica testifies:

"We began taking leases together; we never made any firm arrangements, excepting each one had a third interest in what the company required. We didn't make any partnership agreement; I don't know that we ever really adopted a name."

These are in substance the material facts (excepting two others which we shall notice hereafter) that are offered in evidence tending to prove the intention on the part of these parties to become partners. To a majority of the Court, this falls short of proving such relationship. But on the contrary, it proved, be-

yond a question, they were tenants in common. It is urged that the fact, that these parties, under a firm name, bought property to be used in connection with this license or contract, and gave notes in the same firm name to pay for it, charges them as partners. This is no doubt true as to the parties that dealt with them in that relation, but it is not because they are a partnership *in fact*, but because by the law of estoppel, they would be estopped from denying that relationship. But as to all other parties, the question is, was there a partnership *in fact*. It is further urged from the fact that the property thus bought in the firm name, was used in enhancing the value of the license or contract.

Equity should give the property to the parties who by their property increased its value. Under certain facts and circumstances, equity would so decree, but in the case at bar, those facts and circumstances, that would entitle the parties to such relief, is neither pleaded nor attempted to be proven.

So the majority of the court hold that all of the chattles connected with these wells, of every description, as described in the petition, together with the oil wells and the product therefrom, including the monies in the hands of the receiver, and that may come to his hands, together with all the rights and privileges under this license or contract, is the property of Thomas H. McConica, Wm. B. Ely and W. L. Chubbuck, as tenants in

common, each one third, and the court will so decree.

That out of the proceeds in the hands of the Receiver or that may come to his hands, together with the proceeds arising from the sale of the license or contract, including all oil wells, and all chattels connected therewith, there be paid:

First—The taxes if any.

Second—All costs of this action, which shall include the stenographer's fees, which fee shall include the transcribing in this court of the short hand notes into long hand, and the copying of this opinion.

Third—Of the balance of the fund, one-third should be set apart for Thos. H. McConica, one-third should be set apart for Wm. B. Ely, and one-third should be set apart for W. L. Chubbuck.

Out of the one-third to Thos. H. McConica thus set apart, pay:

1st. Farmer's National bank (two judgments) of date Feb. 6, 1892, and one-half of the judgment in favor of Adams Bros. & Co. of date May 10th, 1892, against Thos. H. McConica, and Wm. B. Ely, without priority, pro rata, figuring interest to this date, July 16, 1894.

2d. Meridian National bank's judgment against McConica, Ely & Chubbuck, Buckeye Supply Co.'s judgments against McConica, Ely & Chubbuck, dated April 29, 1891, July 13, 1891; E. M. Finch's claim for services against McConica, Ely & Chubbuck, Adams Bros. & Co., judgment against McConica, Ely & Chubbuck, dated May 22, 1891, May 5th, 1891, and one-half of the judgment in favor of Adams Bros.

& Co. against Thos. H. McConica, Wm. B. Ely, dated May 10, 1892, without priority, pro-rata, figuring interest to this date July 16, 1894.

3rd. Balance, if any, to Thos. H. McConica.

Out of the one-third of Wm. B. Ely thus set a part, pay:

1st. To Isaac Davis, the amount paid by him for Wm. S. Ely, figuring interest to this date, July 16, 1894.

2nd. To Wm. S. Ely, the amount paid by him for Wm. B. Ely, figuring interest to this date, July 16, 1894, less the amount paid Isaac Davis, as above.

3rd. One-half of the judgment in favor of Adams Bros. & Co. against Thos. H. McConica & Wm. B. Ely figuring interest to this date, July 16, 1894.

4th. Meridian National Bank judgment against McConica, Ely & Chubbuck, Buckeye Supply Co. judgments against McConica, Ely & Chubbuck, dated April 29, 1891, and July 13, 1891. E. M. Finch's claim for services against McConica, Ely & Chubbuck, Adams Bros. & Co. judgment against McConica, Ely & Chubbuck, dated May 22, 1891, and May 5, 1891; and one-half of the judgment in favor of Adams Bros. & Co., against Thos. A. McConica, and Wm. B. Ely, dated May 10th, 1892, without priority, pro-rata, figuring interest to this date, July 16, 1894.

5th. Balance, if any, to Wm. B. Ely.

Out of the one-third of W. L. Chubbuck, thus set apart to pay:

1st. The Farmer's National Bank, judgment against W. L. Chubbuck, dated March 2, 1892, figuring interest to this date, July 16, 1894.

2nd. The Meridian National

Bank, judgment against McConica, Ely, & Chubbuck, The Buckeye Supply Co. judgment against McConica, Ely & Chubbuck, dated April 29, 1891, E. M. Finch's claim for services against McConica, Ely & Chubbuck, Adams Bros. & Co's. claim against McConica, Ely & Chubbuck, dated May 22, 1891, and May 5, 1891, without priority, pro-rata, figuring interest to this date, July 16, 1894.

3rd. Balance, if any, to W. L. Chubbuck.

The cross-petition of Wm. S. Ely, so far as the claim against Finch & Co. is concerned, dismissed. The cross-petition of the defendant, J. L. Wolcott dismissed.

The cross-petition of the defendant, The Buckeye Supply Co., so far as the judgment against McKinnis, McConica & Co., dated May 6, 1891, and the judgment against McConica, Ely & Bicknell, July 13, 1891, are concerned, dismissed.

The cross-petition of the defendant, Solomon Funk, dismissed.

From this distribution, counsel can draft a decree, adjusting the priority of liens.

We will appoint W. H. Kinder to prepare the decree in accordance with this opinion, and will allow him a fee of \$25.00 to be taxed and paid as part of the costs.

Moore, Judge, concurs, and Day, Judge dissents.

John Poe and W. H. McElwaine, for plaintiff.

Ira C. Tabor, for the Buckeye Supply Co., and J. L. Wolcott.

J. Frank Axline, for Finch & Co.

W. H. McElwaine, for Adams Bros. & Co.

A. & F. P. Blackford, for Farmer's National Bank.

Geo. A. Phelps, Duncan & Duncan, for Wm. B. and Wm. S. Ely & Isaac Davis.

Theodore Totten, for Solomon Funk.

MARINE INSURANCE.

(In the District Court of the United States for the Northern District of Ohio, Western Division.)

R. S. Callaway, Receiver, vs Orient Insurance Company. 171 In Admiralty. RICKS, J.

This is a proceeding in admiralty instituted by Samuel R. Callaway, Receiver of the Toledo, St. Louis & Kansas City Railroad Company, for himself, and on behalf of all others whom it may concern, against the Orient Insurance Company, a corporation organized and existing under the laws of Connecticut.

The bill, after averring the appointing of the Receiver and the making of an order by the Circuit Court for this District empowering him to operate said road, and to operate a line of steam boats between Toledo, Ohio, and Buffalo, New York, known as the Toledo, St. Louis & Kansas City Railroad Company Steamboat Line, proceeds to aver that on or about the first day of April, 1893, the respondent, the Orient Insurance Company, duly executed and delivered to the said Toledo, St. Louis & Kansas City Railroad Company its policy of insurance in writing, a copy of which is attached to the libel and marked Exhibit A, whereby, in consideration of the premium agreed to be paid, it covenanted and agreed to insure the said Toledo, St. Louis & Kansas City Railroad Company, doing business under the name of the Toledo, St. Louis & Kansas City Railroad Company Steamboat Line, for account of whom it might concern, against all loss and damage by reason of the perils of the lakes, etc.

The libellant seeks to recover upon this policy of insurance for package freight, freight lists and freight charges of goods shipped on the steamer Dean Richmond on the 13th of October, 1893, from the port of Toledo to the port of Buffalo, the invoice value of which, with ten per cent added for package freight, was \$42,781.61; for freight list, \$2,256.60, and for freight charges \$317.51.

The issuance of the policy is admitted as averred in the libel. The proof shows

that the application for the policy was filed by the authority of the General Freight Agent of the Receiver, with Barker and Frost, the local agents of the Insurance Company at Toledo. It appears from the proof that this firm are agents for several companies, both for fire and marine insurance; that when the application for this insurance was filed with them, they forwarded the same to Smith, Davis & Company, who are the General Agents of the Orient Insurance Company, and several other companies, at Buffalo, New York. The said firm of General Agents placed the risk in this case with the respondents, and sent back a policy duly executed and signed.

The proof shows that the Railroad Company of which Mr. Callaway is Receiver, had taken out for the years 1890 and 1891 similar policies in the same company, through the same agencies, to cover package freight by the line of steamers operated by the railroad between Toledo and Buffalo. The policy is what is known as an open policy, and insures package freight, freight lists and freight charges belonging to the said steamboat line at risk and reported as herein stipulated. The provision as to reports reads as follows. "Shipments to be reported to the agents of said company at Toledo, Ohio." Another clause in the policy provides: "No shipment to be considered as insured until approved and indorsed hereon by this company." As the construction claimed for this policy by the respondent, renders it void because the agents of the Receiver did not report all shipments for insurance to be accepted and endorsed, it becomes important to ascertain from the proof how the business was conducted between the insurer and the insured, for the clause quoted evidently was intended to give some authority to the agent to whom the shipments are to be reported. The policy does not say all shipments shall be reported. It does not say how they shall be reported. In this respect the policy is quite different from that issued by the same insurance company to the Toledo, St. Louis & Kansas City Railroad Company in 1892.

The provision in that policy reads: "The assured agrees to report all shipments to this Company, and a failure to report the full value of each and every shipment shall render this insurance null and void." The policy was allowed to be offered in evidence for the purpose of showing the previous agreement and understanding between the insured and the insurer, and especially to show the change in the practice of reporting shipments as directed by the agents of the insurance company. This policy of 1892 was issued by the same general agents, Smith, Davis & Company, at Buffalo, N. Y., who issued to the same railroad company the policy of 1893 and the policies of 1890 and 1891. The omission in the policy of 1893 of the clause just above quoted, when taken in connection with the instructions and practice established by the agents of the insurance company with reference to reports made of shipments, is very significant, and throws a great deal of light upon the true nature of this insurance contract. The clause in the policy of 1893, upon which this action is based, which provides: "No shipment to be considered as insured until approved and endorsed hereon by this company," could not have been intended to be literally complied with, for it was a physical impossibility in fact to have made such endorsements upon the policy. No space was provided for such endorsements; no blanks were provided for such endorsements. The mode of reporting was otherwise provided through the general agents of the insurer. Blank books were furnished to the general agents, and by them furnished to the local agents of the insurance company, who in turn furnished the same to the agents of the insured, and in these books were certain printed directions, which, with the oral instructions given by the agents of the insurance company, and a custom which was prescribed and carried out by these agents, made and established a certain fixed method for doing this business which must have been well known to the general agents of the insurance company, and the company itself. The printed en-

dorsement on these blank books so furnished by the insurance company, reads as follows: "This book is made part of Orient policy No. 156, and all risks entered herein are subject to all its terms and conditions." The instructions contained in the books and directions given by the respondent's agents were that the agents of the Receiver at Toledo, and Buffalo were to enter in the forms prescribed in the books such package freight as the insured desired to be covered by the risk. These entries were made as each boat was loaded. The values were placed in the proper column, and the amount of premium to be paid was entered in its proper place. At the end of each month these books, with their entries, were examined by the local agents, and compared, and the premiums then paid. The local agents of the respondent had the right, under the policy, to examine all books and bills of lading, and all papers of the insured, by which to test the correctness of the entries made in the books. The latter were a part of the policy. As no space was left on the policy for the endorsements required, the books supplied the want. They were, therefore, a part of the contract, and the manner of their use was to be prescribed by the local agents of the Insurance Company. It appears from the testimony that these books were furnished to the agents of the Receiver at Buffalo by Smith, Davis & Company, the General Agents of the company, conspicuously advertised in the company's policy as its General Agents. The mode of making the entries in the books was known to them.

As these methods were not in violation of any provision of the insurance policy, and did not vary or contradict the terms thereof, it was entirely proper that the instructions of the general and local agents of the company should be shown by testimony, and the custom for doing this part of the business prescribed by them was clearly within the scope of their authority. The practice for three seasons, followed by the agents of both parties, was in perfect accord with the forms,

blanks and books furnished by the company, and known to and ratified by it.

I am clearly of the opinion that the company has no pretext, whatever, for refusing to recognize the act of its agents, and the mode in which they carried on business with the Receiver. It must have been known that the same mode of carrying on business had been recognized in the two preceding seasons of 1890 and 1891, when its same General Agents executed the same kind of policy.

I do not find in the proof, or in any provision of the policy of insurance, any basis for the claim that because some freight was shipped in cargoes where most of the package freight was reported, and insured, that such failure to insure all shipments avoided the policy. The Receiver's agents made no secrecy of the fact that they did not insure freight which the consignors themselves had insured. That would have been double insurance. The practice was well known to the agents of the insurance company, for they insured such freight in their own offices for the benefit of other insurance companies.

It seems plain to me, therefore, that this policy provided for future insurance, and that each endorsement of shipment made in the book provided and furnished by the insurance company for that purpose was a contract of insurance under the policy. This was what the practice and custom prescribed by the books furnished by the company itself, and by the instructions of its agents, clearly contemplated. They also understood it, and I think the contract was binding and was supported by the consideration provided by the policy.

The libelants may therefore have a decree for the amount of shipments endorsed in the books for the cargo of the Dean Richmond for October 13th, 1893. The loss of this cargo was proven, and the fact not controverted by the company. If counsel can agree on the amount, it may be so entered; otherwise there may be a reference to a master in the usual way.

Brown & Geddes, Libellants Proctors.
Cary & Whitridge, for Respondent.

Toledo Legal News.

OFFICIAL LAW JOURNAL OF LUCAS
COUNTY, OHIO.

In the matter of the designation of a daily Law Journal in Lucas County. As required by Sec. 1 of an Act passed April 14th, 1884 and amended Feb'y 25, 1886, entitled "An Act relating to the posting of court calendars and legal notices in certain counties," as amended May 9, 1884, the Judges of the Courts of Record in said County other than the Circuit Court, hereby jointly designate the TOLEDO LEGAL NEWS, a daily law journal published in said County, as the journal wherein until the further order of said judges, shall be published all the notices, advertisements, abstracts and matters and things specified or referred to in said Section 1.

Approved { GILBERT HARMON,
REUBEN C. LEMMON,
ISAAC P. PUGSLEY,
Judges of Common Pleas.
I. I. MILLARD, Probate Judge.

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RECENT CASES.

In the first number of the LEGAL NEWS (see Vol. 1 No. 1) we published a decision by Judge Miller of the Clark County Common Pleas Court, in which the law requiring street railway companies, operating electric cars, to protect motormen, was held to be unconstitutional.

In Minnesota a similar law was enacted in 1893 and has also been questioned on constitutional grounds. The questions presented in the two cases were practically the same but the Supreme Court of Minnesota (59 N. W. R. 545) has held the law to be constitutional. In the opinion the Minnesota Court said.

"In these two cases the validity of Laws 1893, c. 68, entitled 'An act to compel street railway companies to protect certain of their employes from the inclemency of the weather, is called in question. That act requires of street railway companies operating electric, cable or steam cars requiring the constant service of per-

sons on any part of the cars except the rear platform, to provide each car with an inclosure, constructed of wood, iron and glass, or similar suitable material, sufficient to protect such employes from exposure to the inclemency of the weather, but not so as to obstruct the vision of the person operating the car, at all times between November 1st and April 1st of each year. What are called 'trailing cars' are excluded from this requirement, so that it applies only to cars on which the motive power is operated or controlled. The law was passed with reference to the fact that the man operating or controlling the motive power of such cars was required to stand where his person was almost wholly exposed to cold, storm and wind, having but little protection except such as the clothing affords. The act is assailed as unconstitutional, on the grounds: First. That it is not an exercise of the police power of the State. Second. It is class legislation. Third. It impairs the obligation of a contract. Fourth. It interferes with the liberty of contract between street railway companies and their employes. Fifth. It imposes an excessive fine.

"It is stipulated as a fact, what everybody knows, that electric cars are run at rate of speed of from four to fifteen miles an hour, and at an average rate of between eight and nine miles an hour. Any one acquainted with the extreme cold of much of the weather in this climate between the 1st of November and the 1st of April, and who knows, as everybody does, that the motorman on an electric car is obliged to stand in one place, always on the alert, his whole attention given to the means of controlling the motive power and the brake and to looking out ahead, and unable, with due regard to his duties, to give attention to protecting himself from the cold, must appreciate that, when going at the rate of eight or nine miles an hour, perhaps against a head wind, and with the mercury below zero, the position of the motorman is one not merely of discomfort, but of actual danger to

health, and sometimes to life, and the tendency of which is to disable him to some extent to perform his duties in the way that care to safety of his passengers and of travelers on the streets requires. It has never been questioned that the police power of the State extends to regulating the use of dangerous machinery, with a view to protecting not only others, but those who are employed to use it; and if it be conceded, as it must be, that the State may intervene by regulations in such a case, we do not see why it may not in such a case as this. The act is within the police power. When a subject is within that power, the extent to which it shall be exercised, and the regulations to effect the desired end, are generally wholly in the discretion of the Legislature. The Legislature might in this case have required the use of the prescribed inclosure only at such times when the cold reached a certain degree, or when storms prevailed; but it was thought fit to make sure of the result aimed at by covering the time of year when extreme cold and bitter storms may occur at any time; and that was within its exclusive province.

"The objection that this is class legislation is based on the fact that the act is confined to street cars propelled by cable, steam or electricity, and does not include street cars drawn by mules and horses, or carriages or wagons; and it is assumed that here is an attempt at purely arbitrary classification for the purpose of the act. The evil sought to be remedied does not exist in case of the slowly going mule or horse car, or carriage or wagon, to the same degree as in the case of cable, electric or steam cars. But, where an evil exists in a variety of cases, it is a sufficient ground for classification in legislating, so as to include some and exclude others, that in the former the evil can be remedied, while in the latter it cannot be. The man in control of the cable, electric or steam railway car may be boxed in without impairing his power or control in the slightest degree; but to box in the driver of a horse or mule car, or of a stage-coach or carriage or wagon, separating him from his animals, while of course it

could be done, would bring about greater evils than those sought to be remedied. The difference in this respect between cars included in this act and those not included is such as to justify difference in legislating.

"The claim that the act impairs the obligation of a contract is based on the fact that in each case the railway company had a contract with the city, made before the passage of the act, in which the former bound itself to run cars of 'the best modern style and construction,' and this act requires sometime in addition thereto. We need only say of that, where parties contract on matters within the police power of the State, they do so subject to the exercise of that power whenever the Legislature chooses to exercise it. If one contract with the State or a municipal corporation, acting under authority of the State, even if it were conceded that the Legislature can, by contract or by giving authority to make a contract, bind the State not to exercise the police power, the legislative intent to do so would have to appear unmistakably. There is nothing to suggest such intent in the charter of either city."

A recent number of the Central Journal of St. Louis contains an article by Max B. May of Cincinnati, Ohio, entitled "Can a President approve a Bill after the adjournment of Congress?" It refers particularly to the recent decision of Judge Knott of the United States Court of Claims, which holds that the President has the right and power to approve a bill after Congress adjourns provided he does so within ten days of the adjournment. After referring to the only precedent, that involving President Lincoln's approval of "an act to provide for the collection of abandoned property and for prevention of frauds in insurrectionary districts within the United States" nine days after Congress had adjourned, Mr. May says: The State governments have found it advantageous to allow their executive the privilege of approving bills after the adjournment of the legislature, and many have constitutional amend-

ments to that effect. But before these amendments were adopted the governors of several states assumed that right. In New York, Georgia, Louisiana and Illinois, this has been done. In all these States the constitutional provisions relating to the enactment of laws are similar to those of the federal constitution." Concluding Mr. May says, "In as much, then, as there are no constitutional provisions against the exercise of the right herein contended for, and such right would be in the interest of public policy, the Supreme Court should affirm the recent decision of Judge Knott, in case it is called upon to review the same."

"Twice in Jeopardy" is the title of an article by Frank B. Livingstone, which appeared in the August number of the "Green Bag." Mr. Livingstone's conclusions are that the State of Massachusetts, its constitution being silent on the subject, has a right to make a law "allowing a person, for some good reason or reasons, to be put twice in jeopardy for the same offense." That the constitution of the United States provides for such cases occurs to the average man at once, but the fact is the original constitution did not and the first ten amendments, or some of them, which include the case under discussion, have been, at one time or another, held by the Supreme Courts of many of the States, Ohio included, (19 Ohio St. 184), to be restrictions upon the powers of the general government only, and not upon those of the states.

"I therefore," says Mr. Livingstone after further argument, "draw my conclusion, that, since the amendment of the Constitution of the United States does not apply, and the State Constitution does not forbid it, the Legislature has a right to pass a law that, for some good reason or reasons, may compel a person to be put twice in jeopardy for the same offense, and that such a law would be constitutional."

The Supreme Court of Nebraska, in a recent case *Gulla Percha and Rubber Manufacturing Co., vs. Village of Oga-*

lalla, 39 N. W., 513, held that "the contract of a municipal corporation, which is invalid when made, as in violation of some mandatory requirement of its charter, can be ratified only by an observance of the condition essential to a valid agreement in the first instance." And also that "one who deals with a municipal corporation must, at his peril, take notice of the powers conferred by its charter, and whether the proposed indebtedness is in excess of the limitation imposed thereby."

It is held (*Irwin vs McKichnir, Supreme Court of Minn.*) that "the indebtedness incurred by receivers of a railway company, appointed by the Federal Court, while operating the road under the authority of the Court, may be garnished in a state Court" but "that no executory process can be issued against the receivers on the judgment rendered therein. It can only be satisfied as other demands are satisfied, by an application to the Court in which the receivership proceedings are pending for an order directing its payment."

The LEGAL NEWS will print, bind, in fact turn out complete, the report of the last annual meeting of the Ohio State Bar Association.

During the session at Put-in-Bay we made arrangements to get a chance at the work and through the courtesy of Secretary Bryan we obtained the desired opportunity. The result is that we have the contract. Our bid was the lowest of five, by several dollars. Other bidders were Akron and Columbus houses.

The Masonic Home of Philadelphia, an institution intended and used for aged and indigent masons is not, a court of that state has recently held, exempt from taxation under the law exempting institutions of "purely public charity." The exclusion of a person because he was not a member of some particular organization was held to take the institution out of the class known as "purely public charities."

INJURY TO EMPLOYEE.

Vice Principal Doctrine in Ohio. Distinction Between Decisions of Federal and State Courts.

(Sixth Judicial Circuit, Huron County. April Term, 1894. Present, Hoss, C. S. Bentley, P. J.; C. H. Scribner and G. R. Haynes, J.J.)

The B. & O. R. R. Co. vs Sutherland.
Error to the Court of Common Pleas of Huron County.

(A person employed by a railroad company as a common laborer or helper, and by the Company's orders placed under the immediate personal charge and direction of a locomotive engineer, known as a "hostler." HELD, that the engineer is not a fellow servant but a principal and that the Company is liable to an employee who may be injured by the negligence of such engineer or hostler.

2—The relations of superior and subordinate having been established at the time the service was entered into, the fact that the work in which the men were engaged, the manner of doing it, at the time of the accident, would not alone constitute one superior to the other, will not alter or change the original contract, entered into at the time the employment was made.

3—A master mechanic in the employ of a Railroad Company, having general authority to hire men, stands in the relation of the Company to the men and will be held to have authority to establish the relations between them of superior and subordinate.—ED. LEGAL NEWS.)

HAYNES, J.

The case of the Baltimore & Ohio Railroad Company, plaintiff in error, vs William Sutherland, defendant in error, comes into this Court upon petition in error brought for the purpose of reversing the judgment of the Court of Common Pleas in the case wherein William Sutherland was plaintiff and the Baltimore & Ohio Railroad Company was defendant.

The petition in the Court of Common Pleas sets forth that the defendant is a railroad company etc., and that the plaintiff on or about the 31st day of January, 1882, and for some time prior thereto was, and had been in the employ of the defendant as a common laborer at its coal yard in the Village of Chicago Junction, Huron County, Ohio, and that by said defendant's orders, was placed under the immediate personal charge and direction

of one Edward Lewis, a locomotive engineer of the defendant, and known as the "hostler," and while in the performance of his duty to said defendant in his said employment, and while strictly obeying the orders and directions of said engineer or "hostler," said engineer so carelessly, negligently and recklessly ran, moved and managed one of the locomotive engines of said defendant that it was then and there run upon and against this plaintiff, breaking and crushing the bones in his right leg, lacerating and tearing the flesh, between the knee and the ankle joints, causing him great pain and suffering, and whereby amputation of plaintiff's leg became and was necessary etc., setting forth the damages and asking for judgment.

To that, there was an answer filed by the company which, in its first defense, says it is a corporation, owning and operating a railroad as therein described, but denies all the averments contained in the petition, and setting up certain matters by way of a second defense which is immaterial perhaps to introduce here. Suit was commenced by the plaintiff, soon after the injury and the case, by a curious conjunction of circumstances, has been delayed until a trial was had in the Court of Common Pleas a short time since, and it is now in this Court, some 12 years after the time of the accident.

The case was tried to a jury and was very ably contested and was submitted to the jury upon charges given by the Court.

There are, I may say, many exceptions noted in the case, some to the admission of evidence, and some to the rejection of evidence, and some to the refusal of the Court to charge and some to the charge of the Court as given.

The case was tried upon rather differ-

ent theories which were entertained by the respective counsel for plaintiff and defendant, the counsel for the plaintiff pursuing their line, submitted evidence under what they conceived to be the rules of law as laid down by the Supreme Court of this State governing this class of cases.

The defendant submitted testimony and submitted charges to the Court and took exceptions to the charge of the Court and the refusal of the Court to charge, upon the theory as laid down by the Supreme Court of the United States in the case wherein the Baltimore & Ohio Railroad Company were plaintiffs in error and Baugh was defendant, found in the 139 United States Supreme Court Reports, page 368.

It is claimed by the counsel for the plaintiff in error here that the decision made by the Supreme Court of the United States does not materially conflict with the decisions that have been made by the Supreme Court of the State of Ohio.

It will be impossible, in the time that is allotted me for the delivery of this opinion to go through with an examination of all the exceptions that have been made in this case; but a discussion of some of the leading principles involved in the case and some of the leading facts, will practically decide the case and will also decide the various exceptions that have been noted in regard to the testimony and the charge of the Court.

The petition, it will be observed, alleges that Sutherland went into the employ of the railroad company as a common laborer, but directly to act under the personal charge and direction of one Edward Lewis, a locomotive engineer of the defendant, his petition being sub-

stantially that of helper to the "hostler," as he is called. The contention of the plaintiff's attorneys is that, by the terms of the contract which was made by the direction of the party who employed Sutherland, Lewis became his immediate superior and in that capacity, stood as a representative of the company, and that Sutherland became subordinate to Lewis and was bound to obey his directions and orders and to do as he was asked by Lewis.

The theory of the counsel for the railroad company is, that Lewis was in no sense the superior officer of Sutherland; that he did not stand in the position of a representative of the company, but that some other party was the superior officer, to-wit, the master mechanic

The first question that is presented for our consideration and the first matter that we ought to examine is as to which theory is the correct one for the government of this case.

I call attention to the case in the 31st Ohio State, page 292, the case of the *Berea Stone Company against Kraft*. That in the case where the laborer in the employ of the Berea Stone Company had been injured, as was alleged, by the negligence of the foreman. The injury occurred by reason of a certain appliance for lifting stone being too slight and insufficient. This had been attached to a stone by the foreman who, at that moment, took the place of a common laborer, who was temporarily absent, and after he had attached the apparatus or appliance the stone was lifted and the car or appliance then broke and the stone fell upon the plaintiff.

In that case the laborer, and it was claimed that in as much as the foreman was occupying the position of a common

laborer, the company was not liable; that he stood for the time being, at least, in the position of a co-employee of the plaintiff in the case, in the same line of duty and not in a position of control or superiority.

The Court say in that case, that "the relation existing between them was such as brings the case clearly within the rule established by repeated adjudications of this Court, and now firmly settled in the jurisprudence of the state, that where one servant is placed by his employer in a position of subordination to, and subject to the orders and control of another, and such inferior servant, without fault, and while in the discharge of his duties, is injured by the negligence of the superior servant, the master is liable for such injury;" and they held the company liable. I read that as a statement of the law of Ohio as delivered by the Supreme Court.

The Supreme Court has recently had occasion to examine a case arising in part, at least, under a new section of the law passed April 2nd, 1890; it is the case of the railroad company against Margrat, decided March 13th, 1894, and is to appear in the 51st Ohio State Reports. I read at page 250 from the Law Bulletin of May 7, 1894. In that case the brakeman of one train in the line of his duty, passing from the locomotive of his train to the rear of his train for the purpose of detaching certain cars, passed upon the main track of the railroad company, claiming that he had a right to do so and practically was compelled to do so because of the icy condition of the road-bed between the tracks that his car was upon, or the train was upon, and the main track, and was injured by being run upon or over by the locomotive in charge

of the engineer who had the fireman with him, the fireman who was under him; as was claimed, although that was denied by the railroad company, and this section of the statute was interposed, or cited as ground for holding the railroad company liable; Section 3: "That in all actions against the railroad company for personal injury to, or death resulting from personal injury, of any person, while in the employ of such company, arising from the negligence of such company, or any of its officers or employes, it shall be held in addition to the liability now existing by law, that every person in the employ of such company, actually having power or authority to direct or control any other employee of such company, is not the fellow servant but superior of such other employee; also, that every person in the employ of such company having charge or control of employes in any separate branch or department, shall be held to be the superior and not fellow servant employes in any other branch or department, who have no power to direct or control in the branch or department in which they are employed."

The contention of the railroad company was that the engineer of the locomotive was not the person charged with the employe of another branch or department, such as would make the company responsible for his action, but that it had reference to some person who had charge of that whole department; for instance, charge of the locomotive department, or the transportation department.

The Court in discussing this matter, make some statements as to the law of Ohio at the time this act was passed. They say: "This section explicitly declares an intent to preserve the existing

liability of railroad companies for the negligence of its employees towards each other, as well as to add to it. The liability that existed before and at the time this action was enacted into a law is, perhaps, as clearly set forth by the cases of *Railroad Company vs Kearney*, 3 Ohio State, 201, and *Railroad Company vs Lewis*, 33 Ohio State, 196, as in any of the cases bearing upon the subject to be found in our reports. In the sixth and ninth clauses of the syllabus in the first of the above mentioned cases, this Court declared that "A principal is not liable to one servant in his employ for injuries resulting from the carelessness of another servant, when both are engaged in a common service, and no power or control is given to the one over the other. They stand as equals to each other, and are alone liable for the injuries they may occasion."

9. The agent or officer, entrusted with power and control over the subordinates, and the operation of the business, is not engaged in a common service with them, admitting of joint participation; nor is he, in any just sense, their fellow servant; but their employments are separate and distinct, although both are necessary to a successful result in the business."

While in the second and third clauses of the syllabus, of the latter of the two cases it states, that:

2. "Where, however, a master places one servant in a position of subordination to another servant, and the subordinate servant without fault, is injured through the negligence of the superior servant, while both are acting in the common service, the master is liable therefor."

3. Whether or not one servant is placed by a common master under the control of another servant, thereby creat-

ing the relation of superior and subordinate between them, must be determined from the evidence in each particular case."

Now, if the express rules of a railway company or its recognized custom, gives to an engineer in charge of a locomotive authority to direct or control a fireman in the discharge of his duties on the same locomotive, then the relation of superior and subordinate is created between the two; and it would seem that the principles announced in the foregoing syllabi would render the company liable to the latter for an injury resulting to him through the negligence of the former, while both were acting in the common service. The remedy was so complete, where the relation of superior and subordinate actually existed, that the statute here, could have little or no operation. Still, it may be said that the statute makes the rule of liability of certain and universal application, denying any exception to its operation, wherever the relation of subordinate and superior exist, and the subordinate is injured by the negligence of the superior, while engaged in the common service.

The relation of superior and subordinate, however, did not actually exist between Margrat and the engineer by whose negligence he was injured; for, as we have seen, the latter had no authority to command or direct the former in discharging his duties. But the statute, we think, declares that relation to exist, as matter of law, for the purpose of charging the company, if the engineer was the superior of, that is, was authorized to command or direct, any co-employee whatever, and Margrat was without such authority. They must have been in separate branches or departments of the

company's service, for the section so declares. The section, however, makes no attempt to define the terms, "department" and "branches;" but these terms should not be limited so as to embrace merely, those large divisions, created for convenience in administering the affairs of the company. On the contrary, it is more reasonable to suppose that they relate to those minute ones which concern the daily duties of the employes. Those terms are general and comprehensive; but as the legislature discloses no purpose in this connection, to regulate the internal affairs of a railway company, it should not be presumed to refer to divisions of its business made for its own ends, and if not to such divisions, what divisions could it mean, but those which divide up the employes while in actual service. The section expressly declares a purpose to enlarge the remedy of the employes for accidents occurring in the course of their employment. This declaration emphasizes the presumption that the terms under consideration should be construed as referring to conditions affecting them, rather than to those which are established by the company for its own purpose."

We think these statements of the law of Ohio cited, are sufficient to say that the rule of law, as laid down by the Supreme Court of Ohio, is such that, if it be true that Lewis was to have the charge and control of Sutherland, and Sutherland was to be subordinate to him and obey his directions and take his commands from him, it would create a relation of superior and subordinate between Lewis and Sutherland. That is to say, as to Sutherland, Lewis would stand in the position of the company, and would be the representative of the company.

It would seem to us, after a careful

reading of this case, cited by counsel in the Supreme Court of the United States, that there is a distinction, a marked difference between the law of Ohio, as laid down by the Supreme Court of Ohio, and the law, as laid down by the Supreme Court of the United States, in the case cited. In short, it seems that the contention that is being made by counsel for the railroad company here, is substantially the contention that was being made in the Margrat case, for the railroad company under the laws of Ohio, and that is, that the person who is to be deemed his superior is really the head of the department, in this case, the master mechanic.

This leaves us to the discussion of the question as to the relation between Sutherland and Lewis as evidenced by the testimony in the case.

I may say here, that the case is not free from doubt and may be said to be a very close case. Nevertheless, we have to take the testimony as we find it in the record and endeavor to give it a fair and just interpretation and to ascertain the result that ought to be arrived at in the case.

As to the employment of Sutherland and the duties that were assigned to him, we have in the main, the testimony of Sutherland alone. Sutherland tells us that he was hired by a man by the name of Gunther who was called the master mechanic of the shops and who was authorized to employ men. Indeed, it was stated by the counsel for the defendant below, that he admitted that Mr. Gunther was the master mechanic and hired the men and also stated that he hired them and discharged them; that the superintendent of motive power gave him authority to do so, the superintendent

ent of motive power being Mr. Harrison, I believe.

Sutherland says he was employed in January, 1882, that he went to work on the 16th day of January. He was first asked in regard to his position and who employed him and he says it was the master mechanic. He then says, "I asked Mr. Gunther for employment; he told me he could give it to me at the coal chutes. I asked Mr. Gunther for employment and he told me he could give me employment at the coal chutes; he told me that Edward Lewis was 'hostler' and that he would instruct me about this work if I would work under his instructions at the chutes."

Question. "What if anything did he say about obeying him?" Answer. "He said that I would give the supplies under his orders, obey him."

Question. "Obey his orders?" Answer. "Yes sir."

The testimony then changes to a party that was temporarily acting in the place of Mr. Lewis. He says, he was to go there and work under Mr. Brunbaker until Mr. Lewis would come.

Now Mr. Sutherland, as I have already stated, is the only party that testifies as to actual conversation between himself and Mr. Gunther. Mr. Gunther it is said, left the employ of the company, I think the testimony shows that, and is in some other place, where, it is not stated. It is sufficient to say that his testimony has not been taken in any form, so we cannot, or do not have his version of the case.

We think the testimony of Sutherland fairly shows that when he was employed, he was employed to be an assistant to Mr. Lewis, the "hostler;" he was to take his orders from him and receive his in-

structions from him, to do what he was directed by Lewis to do.

Lewis, as is shown in another part of the testimony, was to receive the locomotives, when they were brought in and placed upon the sidetrack and was to see that they were supplied with coal and sand and with water, and to clean out the furnaces and put out the fires, and have them in condition and for preparation to go out again, when they should be required to go out.

While the testimony is not very clear upon that point, still it shows that, as we understand the record, Mr. Sutherland was to assist Mr. Lewis in relation to these various matters.

The injury occurred at the coal chutes while the locomotive was receiving coal and the testimony is very largely confined to what transpired at that place; what was done, what orders were being given at that time and at that point.

Some testimony has been offered by witnesses on both sides in regard to the duties of these helpers and in regard to the duties of the hostler. The testimony of Mr. Harrison, the superintendent of motive power was taken and some of his testimony was received in evidence and some of it was excluded. His testimony was taken for the purpose and was offered as tending to show that Lewis was not a superior officer of Sutherland, that he really had no control over him, that the two were employed in and about a common service and each was pursuing his own particular duties without any special power of the one over the other, in giving orders or directing his actions or movements. Some portions of his testimony was excluded and exceptions were taken; but we might say in passing, that we are unable to see that the Court com-

mitted any error in doing so. We think there was a marked tendency on the part of Mr. Harrison in giving his testimony, perhaps in some instances, in answer to questions, for him to attempt to testify as a matter of law, what his position and these parties was toward each other, and to place himself in the position of the jury deciding the questions at issue.

It is said here, in relation to this matter by counsel for the railroad company that, although the testimony of Sutherland rather tended to show that Lewis was his superior officer, yet that of itself does not conclude the case; that it is to be shown further that, by the orders and directions of the company, and by the rules and regulations of the company, Lewis was directed to become the superior officer of Sutherland, to give him orders and directions as to what he should do.

We are unable to concur in the view that is taken by counsel in that respect and appreciate at least, the full force of the objection. It seems to us that it is sufficient for the purposes of this case to say that if Sutherland was hired as one of the helpers of Lewis, and he was then directed to receive his orders from Lewis and obey his orders, that would place him in the relation of a subordinate to Mr. Lewis. That would fix his position so far as he and the railroad company are concerned.

We may say frankly that, in deciding this case, that if we were to take alone, the testimony of the various witness for the plaintiff as to what was done by the parties and their acts in conducting and carrying on the business, we should very seriously doubt whether there was any relation established of superior and subordinate between Lewis and Sutherland.

But the testimony of Sutherland stands here, and stands uncontradicted and evidently has been acted upon by the jury and by them taken to be true and they have returned a verdict which, of course, must find and necessarily does find that Lewis was the superior officer of Sutherland and in that capacity really represented the company.

It is claimed and argued by counsel for the railroad company that, at least, in some instances the testimony shows that Mr. Lewis was obeying Mr. Sutherland in the matter of receiving coal at the chutes and in moving the engine.

By looking into that testimony, we find something like this condition of affairs existing: The chutes by which the locomotive received coal have been described. There were two helpers assigned to the assistance of Lewis and their duties were divided something like this. One would go to the coal bin and proceed along the top of the bin and ascertain the amount of coal that was in the bins, if he did not have that information already furnished him, and would give the general direction as to the particular bin out of which the locomotive should receive its coal. Sutherland was to assist in letting down aprons and opening coal chutes and causing the discharge of the coal into the tender of the locomotive. When that was completed, it was customary for him to, at least, assist in closing up the chutes and putting up the aprons so that the locomotive might either pass away entirely from the chutes, or remove to another chute if it was necessary to be done.

The testimony shows that when the helper at the top of these chutes found the proper chute from which the coal was to be taken, he would give notice to the

engineer as to the particular chute to which he was to move his locomotive.

Some evidence was given tending to show that when the discharge of the coal was completed, Sutherland would put up the apron and then would give notice to the engineer that the chute was in a condition so that the locomotive could be moved.

Suffice it to say that, in regard to these matters, it seems to us that they don't throw any material light upon the relations of these parties, or materially change the relation that was entered into between them at the time the contract was made.

It must necessarily follow that the engineer, assuming that he was the superior officer, must receive from his subordinate notice from time to time, of certain facts, certain conditions upon which he would act. This did not throw upon this superior the condition of subordinate by thus directing him what to do. The signals simply operated as a notice from these parties to him of the matters upon which he might act and the conditions under which he might then proceed to move his engine at his will.

Everything is sustained with the general view that the engineer was in charge of his engine or locomotive and was there receiving coal and was to give general directions in regard to the receipt of coal by the locomotive, the amount he should take,—the amount he needed, and the general purposes to be carried out in taking coal from the chutes.

As I have already stated, what was to be done afterwards by these helpers,—how far they were to assist him, except that they were to assist him generally in taking in water and sand and cleaning out the coal ashes, is not very definitely

given, but that they were to be his helpers is clearly shown.

Now, it might be very strongly argued, as it has been urged, that these facts alone would not constitute one superior to the other, but as I have already stated, we think, when taken in connection with the original contract, that that testimony would not change the contract, and that the relation of these parties was established at the time the service was entered into,—at the time the employment was made.

It is objected that Gunther was not authorized to establish these relations, but the testimony shows, we think, taking the testimony of different parties,—that Mr. Gunther was there as master mechanic and general authority was given him to hire men, to determine the number of men, in a general way, by the master of transportation, Mr. Harrison, and in the hiring of the men, in the employment of them, he really stood in the relation of the company to the men. He hired them and he stated to them the terms of the contract.

It does not appear here that Mr. Harrison ever interfered as to the relations established between these parties, nor ever interfered generally in regard to the matter, except it is said that Mr. Gunther could not finally discharge men except by Mr. Harrison's request; nor could he, as a general rule, hire men; but we think that is to be taken in its general sense,—that Harrison had general control over his department and had general authority to direct Mr. Gunther as to the number of men he was to employ and that all the details of the matter was committed to Mr. Gunther and that in that relation, his was as completely the act of the railroad

company as if Mr. Harrison himself had been present representing the company.

It was claimed that this injury did not occur to Mr. Sutherland by reason of any act of Lewis while he was in the line of his duty. There was a great deal of controversy as to the manner in which this accident occurred and the circumstances and the surroundings. There were four persons who were present at the time of the injury. There was Mr. Sutherland and there was the other helper who was on top of the chutes, but who really heard but very little of the matter; indeed, the only thing that he seems to have heard which was directly connected with, and as the result of the injury, was the outcry that was made by Sutherland at the time that he was injured when he called to the engineer that he was caught, and that he should move the locomotive ahead. The other party, of course, was Sutherland, that is, as far as the helpers are concerned; and then the other parties were the engineer, Lewis, the "hostler," and the fourth party was a man by the name of George, who was the fireman and who, as the record shows, is dead.

The counsel for the railroad company offered to put witnesses upon the stand, and offered to prove the testimony that was given by Mr. George upon the trial which was commenced in this case and had in the United States Court at Toledo.

Objection to that was made by counsel for the plaintiff, and the testimony was ruled out by the Court or rather he was prevented from giving it and the objection was sustained to it. No exception was taken to that, and it simply stands in that manner and form so that we have not the testimony of Mr. George in relation to the matter.

The testimony shows that these parties

had received from a certain coal chute,—number 11, I think was the number,—a certain quantity of coal and the engineer said he needed a little more coal, or some more; thereupon Mr. Sutherland, as was his proper place, said he should move his locomotive to coal chute number 8, and that, in the position which the locomotive occupied at the chute at the time, would necessitate the backing up of the locomotive from number 11, to number 8.

Lewis was in his proper place in the cab of the engine and Sutherland testifies that he, Sutherland, stepped upon the platform or rather the apron of the coal chute with his left foot, placing it upon some bar that ran across, or some little elevation that would hold him in that position and near to the edge of the apron. The apron had upon its side, a plank about 6 or 8 inches in height and it had attached to this point near where his foot was on the outside, a chain which was attached to a weight in the chute that was used for drawing up the apron when they got ready to raise the apron up and to hold it up; that he placed his left leg upon the apron and placed his right leg over the side of the apron and from that point, reached up to a point about the middle of the apron where it was connected with the chute and where some coal had lodged, for the purpose of removing the coal and coal dust so that the apron would go up to its place without any obstruction, and that just as he had leaned over in that position and while he was in the act of so removing the coal, Lewis suddenly backed the locomotive and his right limb was caught between the top of the cab, or the corner of the cab perhaps, and the side of the apron and his knee was crushed.

There is conflicting testimony as to how

the locomotive came to be started. Mr. Lewis contends in his testimony strongly, that he received notice from Mr. Sutherland that the locomotive should be moved. Sutherland denies that he gave any notice of that kind, but says the movement was voluntary upon the part of Mr. Lewis.

The injury occurred, however, but the position of the parties is used as an argument for the purpose of showing that the plaintiff had been guilty of some negligence himself in the matter, and in part, for the purpose of showing that Mr. Sutherland is not correct in his statement in regard to the position he occupies; for it is contended upon the part of the railroad company, that Mr. Sutherland was, at the time, seated on the top of the cab with his feet hanging over, as we understood, and that he had stated to parties that he was in that position, and that in doing so, he had forgotten,—that he had said that the apron had not been raised; it had passed from his mind momentarily and that when the locomotive moved back, his limb was caught. The testimony of the physician who attended him afterwards and who assisted in the amputation of his limb, was given, wherein he states that Mr. Sutherland in detail told him that that was the position he was occupying at the time.

Some conclusions are endeavored to be drawn from that position,—from the injuries that were received, as they appeared on the limb itself, to show that that was the position that he occupied. That matter has been submitted to a jury and they have found in favor of the theory of Mr. Sutherland.

There was testimony given contradicting Mr. Sutherland's testimony and testimony given to contradict the physician in his statement; indeed, the whole line of testimony ordinarily given in such a case,

was resorted to, and the whole matter was submitted to the jury and with their findings of facts in that regard, we do not feel that there is any occasion to interfere.

The position of the party, so far as we can ascertain from the evidence and from the photographic maps that were exhibited to us, is as consistent with the theory of Sutherland as it is with the theory of the other party, and certainly there is no such weight of testimony against the theory of the plaintiff as would call for an interference upon the part of this Court to disturb the verdict of the jury.

Upon the conclusion of the testimony, the defendant in error requested certain charges of the court and these charges are copied into the bill of exceptions for the purpose of presenting the question which is made and presented to the Court, for the purpose of saving the view that the counsel has of the law of the case, and they are well framed for the purpose. The Court, however, refused the charges requested, and charged the jury upon the theory of the law that is laid down by the Supreme Court of this state.

Without going into any of the details in regard to that matter, we are of the opinion that the charge of the Court is substantially correct and we see no reason for disturbing the judgment in the case by reason of any error in regard to rejecting requests, or in regard to those directions upon the part of the Court.

There is one matter here that perhaps should be referred to, and that is in regard to the matter that is set up in the second defense. It seems that the company had organized a sort of insurance company in which Sutherland had become a member as is claimed. That was offered in evidence although not strenu-

ously urged here by counsel, as we understand, for the purpose of showing that the plaintiff was not entitled to recover because of the stipulations or agreements contained in this association paper.

The particular clause that is referred to, is this: "As it is not contemplated in this scheme to give double benefits in cases of disability or death resulting from accidents, the benefits herein promised shall not be payable nor paid when the contributor or any person entitled to damages because of the accident to him, whether resulting in death or not, has or makes a claim against said company or any of the companies operating its branches or divisions, (including the Chicago Division), until there be first filed with the Committee a release, satisfactory to them, releasing said companies from such damages, signed by all persons entitled to the same."

It is sufficient to say that there is nothing to show that the plaintiff, Sutherland, ever claimed any benefits under this policy or paper; that none was ever made to him, although there is an averment in the answer that the company tendered to him any damages that he might claim under this policy and that they had also furnished him certain medical attendance.

We think that cuts no figure in the defense of the case. It is, however, strenuously urged that this paper should have the effect of fixing the status of Sutherland in relation to the company, and to show that, instead of being the subordinate of Lewis, he was in fact, in another department, and subordinate to other persons. The application for membership is filled out evidently by Sutherland or by some party, and is signed by Mr Sutherland, as he himself states in his testimony: "The Secretary of the Balti-

more & Ohio Railroad Employees' Relief Association: William Sutherland of Chicago Junction, in the County of Huron, State of Ohio, aged 30, at present employed as a laborer in the machinery department of the Baltimore & Ohio Railroad Company, apply to be admitted a member of the Baltimore & Ohio Railroad Employees' Relief Association, hereby consenting to be bound by the rules of the association as herein set forth, which I have read, (or have had read to me), and agreeing that &c." This is dated the 17th day of January, 1882.

The testimony was rejected by the Court and under the view that we have taken of the effect of the contract that was made between the parties, we are unable to see how this would have any material effect upon the relation of Lewis to Sutherland, in this case, or of Sutherland to the company.

We do not find that it appears but that, as a matter of fact, he was in the machinery department. He was hired by the master mechanic. That goes about as far as any testimony to show in what department he was engaged. He was engaged as a common laborer and was engaged by the master mechanic.

We are of the opinion, therefore, that the Court did not err in ruling that out,—that particular matter of evidence.

As I have already stated, the general items of evidence that have been offered are along the line of the respective theories of the parties and are to be governed by the views the Court took in relation to these theories. We have carefully read this record from end to end and we have as carefully read the briefs of the respective counsel in the case, and while, as we have said before, the case is not one that is entirely clear and free from doubt, yet in our view of the law of the case, and the facts of the case, our judgment is that the judgment of the Court of Common Pleas should be affirmed, but without any penalty other than costs against the plaintiff in error.

J. H. Collins, for plaintiff in error.

Charles Pratt and Walker & Severance, for defendant in error.

COUNCILMEN.

Appointment by Mayor to Fill Casual Vacancy.

(Circuit Court, Ottawa County. June Term, 1894. Present, Hons. C. S. Bentley, P. J., C. H. Scribner and G. R. Haynes, J. J.)

The State of Ohio, ex rel, Myron T. Palmer vs Frances L. S. Darby.
Quo Warranto.

1—The exclusive right of the Council to judge of the election returns and qualifications of its own members, under section 1679 R. S., does not extend to a case where the controversy is not simply which of the two or more persons was properly selected to fill a conceded vacancy, then to be filled by some one, but where the point in dispute is whether, under the law, there is any vacancy or office then, to be filled by election or appointment.

2—The provisions of section 1724 must apply in determining whether the appointment shall be till the next annual municipal election or for the unexpired term, and, under that section, an appointment of a councilman by the Mayor, made with the consent of the Council, must be for the unexpired term of the person, who, after being elected and qualified, ceases to be a Councilman before the expiration of the term for which he was elected.

3—The misapprehension of the true tenure of the appointee, on the part of the Mayor, the appointee or others, cannot abridge the term fixed for his continuance in office.

4—In view of the particular provisions of sections 1713 and 1724 R. S., in connection with the more general provisions of section 8, a Councilman appointed for an unexpired term may hold office until his successor is elected and qualified.

5—While regular elections may be and are required to be held in anticipation of the expiration of an official term and appointments to an office, originally appointive, may be made while the person holding the office is still serving his term, yet neither an election nor an appointment to fill a casual vacancy can be held or made anticipatory of the vacancy nor until its actual occurrence.

6—The appointment of a person as Councilman to fill a vacancy occasioned by the removal of the person elected to the office, must be with the consent of the Council and such consent must be manifested by some affirmative act; mere silence or failure to object on the part of the Council is not sufficient.

7—The Council is not required to take immediate action upon the appointment but may defer action and it is competent for it to act upon upon the matter until the Mayor, or the force of circumstances, has withdrawn the nomination; but whenever it gives the requisite consent, in the requisite way, it cannot thereafter undo its effect, nor must one who thus becomes a DE FACTO member, except in the manner provided by statute for his removal.

8—It is not absolutely required that the consent of the Council should be expressed by actual vote upon the direct question of approving the Mayor's choice, it if be plainly and affirmatively given.

9—A record of the proceedings of the Council indicating that the person appointed to fill a vacancy, was, after his appointment, elected clerk PRO TEMPORE, together with other like evidences of his recognition as a member, is sufficient to show that the Council consented that he was then a member and the appointment having been made in presence of the Council, its

members knew that his only claim to a seat was by virtue of that appointment which only needed their consent to make it effective. Such affirmative action of the Council should be allowed a broader significance than being treated as a mere recognition as a DE FACTO member of the Council, as it fully shows the CONSENT required by section 1724 R. S.—ED. LEGAL NEWS.)

BENTLEY, J.

This action in Quo Warranto is brought for the purpose of obtaining a judgment ousting the respondent from exercising the office of Councilman of the Village of Wauseon, Fulton County, O., and declaring the relator entitled thereto.

By the pleadings and proof it appears that in June, 1892, Wm. C. Barnes held said office of Councilman, having been elected thereto for the term of two years in the spring of 1891 and having duly qualified. On June 20th, 1892, it was shown to the Mayor and Council of the village that Wm. Barnes had removed from the village, and the Mayor thereupon duly declared said office vacant, and, with the advice and consent of the council, duly expressed by a ye and nay vote, duly rendered, duly appointed John S. Dimke to fill said vacancy. On July 18, 1892, Dimke having refused to accept said appointment or to qualify, the Mayor appointed Myron T. Palmer, the Relator, to fill the vacancy.

Mr. Palmer, being present at the time, was sworn in and took his seat as Councilman.

At the spring election of 1893 George W. Hartman was duly elected to said office, but having refused to qualify, on April 17, 1893, the Mayor declared a vacancy in said office and again appointed the Relator to fill it, and the Relator

being present at the time, again took the oath of office and continued to discharge the duties of Councilman.

By reason of some misapprehension or other cause, the names of no candidates for said office were placed on the tickets of either or any political party in the spring of 1894, so, of course, no one was elected thereto.

Thereupon a special meeting of the Council was called for April 12, 1894, and at that meeting, the Mayor and six members of the Council, including the Relator, were present. At this meeting the Mayor declared said office of Councilman vacant, "on account of expiration of time of Myron T. Palmer, an acting member" as the record recites, and appointed the respondent, Darby, thereto, and on motion then and there made to confirm said appointment three of said Councilmen voted yea and three (including Palmer, the Relator,) voted nay, and the Mayor's name being thereupon called, he voted yea, and declared the motion to confirm carried, whereupon the respondent was sworn in and took his seat as Councilman and has since continued to act as such, in place of Palmer, who has not since acted but brings this suit in the name of the State to determine the right of himself and the respondent to the office.

On behalf of the respondent it is urged that this Court has no jurisdiction of such a case, since by section 1679 R. S. the Council is made "the judge of the election returns

and qualifications of its own members." But we do not regard this exclusive right of the Council as extending to a case where the controversy is not simply which of two or more persons was properly selected to fill a conceded vacancy then to be filled by some one, but where the point in dispute is whether under the law there is any vacancy or office then to be filled by any election or appointment. It would hardly be contended, for instance, that a Council could assume that the term of one of its members regularly elected under the law for two years, expired in one, and upon some other person being elected or appointed then to such supposed place, could vote to seat the new claimant in place of the old member and successfully defend its action and the old member be concluded by the action of the Council under this section.

The principles recognized and enforced in the case of the *State ex rel vs O'Brien*, 47 O. S. 473, see 47, O. S. 566, and 44 O. S. 469, in our view, forbid the conclusion that sec. 1679 confers the exclusive, if any, power on the Council to adjudge in such a case as is here presented.

If the Relator has any right to exercise the powers and perform the duties of the office, it is wholly because he was legally an officer whose rightful incumbency had not terminated when the respondent was appointed, and no action of the Council other than by the motion of a member (1684-5) according to the requirements of the statute,

could interfere with a tenure positively fixed by law.

We must inquire then, by what if any rightful and definite tenure was Palmer holding the office when Darby was appointed, or, in other words, was there a vacancy which could lawfully be filled by appointment?

Under sec. 1673, the regular term of Councilmen is two years. In case of a vacancy in the Council, were it not that sec. 1724 makes special provision applicable only to Councilmen, it might well be held that the more general provision of sec. 1713 in the chapter on "Officers of Cities and Villages" and which is made applicable "unless otherwise provided in this title," would apply, but since sec. 1724 being thus special and containing provisions regarding the time for which vacancies in the *Council* may be filled, wholly different from those in sec. 1613 regarding vacancies in municipal offices, generally, we think it clear that notwithstanding the reference to sec. 1713 in sec. 1693, these provisions of sec. 1724 must govern in determining whether the appointment shall be "till the next annual municipal election" or "for the unexpired term." The appointment therefore must be for the unexpired term. We think it is not competent for the Mayor to fix the term of the appointment otherwise, and his appointment of a councilman, when made with the consent of the Council, is for the unexpired term of the person who after being elected and qualified, ceases to be Councilman before the

expiration of the term for which he was elected. And the misapprehension of the true tenure of the appointee, on the part of the Mayor, the appointee or others cannot abridge the term fixed by law for his continuance in office.

Section 1713 also provides that "unless otherwise provided, all municipal officers shall serve until their successors are qualified."

See sec. 8 and sec. 11 R. S.

Mechem in his work on Public Offices and Officers, sec. 402, lays down the rule that officers appointed to fill vacancies in elective offices are generally considered as appointed for the remainder of the unexpired term of the person whose place they fill, and that on failure to elect at the regular election, they hold over, and that if the provision is that they are to continue until their successors are elected and qualified there must be an election and not an appointment of a successor.

In *State vs McGregor*, 44 O. S. 630-1, the Supreme Court held that sec. 1208 and not sec. 11 applied to the filling of vacancies in the office of Sheriff and Coroner. And we suppose that in view of the particular provision in sec. 1713 and 1724 in connection with the more general provisions of sec. 8, that if Palmer was legally appointed and confirmed to fill the unexpired term of Barnes, which would end in the spring of 1893, he would hold the office till his successor is elected and qualified.

If, in 1892, Palmer was duly ap-

pointed by the Mayor with the advice and consent of the Council properly expressed, there has never been a vacancy in the office since which could be legally filled by appointment and the appointment of 1893, however formal, was of no effect. And if he was not so appointed and confirmed in 1892, he was simply a *de facto* Councilman, at least till the alleged appointment of 1893, and there was, during all that period, a continuous vacancy which might at any time have been filled by appointment. And, of course, could have been filled by his own appointment, in the spring of 1893, or before or since, or if he was never legally appointed and confirmed, by the appointment of another person, Darby for instance.

While regular elections may and are required to be held in anticipation of the expiration of an official term, and appointments to an office originally appointive may be made while the person holding the office is still serving his term and in anticipation of its regular expiration yet neither an election nor an appointment to fill a casual vacancy can be held or made anticipatory of the vacancy nor until its actual occurrence. This is manifest from the sections 1713 and 1724 providing for the filling of such vacancy, and from the opinion in *State vs McGregor*.

It becomes therefore of the first importance to determine whether at any time since the vacancy occasioned by Barnes removal from the village Palmer was legally appointed by the Mayor, by and with

the consent of the Counsel, as required by section 1724. We regard that section as expressing the requirements of law as to the appointment of Councilmen to fill vacancies rather than the more general sections 1711 and 1713 for the reason that it, 1724, is specially applicable to such officers only. It will be noticed that there is a difference in the wording of the three sections, sections 1711 and 1713 each requiring that the appointment be made "with the advice and consent of the Council" and section 1722 requiring that it be made "by and with the consent of the Council." Whether the addition or omission of the word "advice" is of itself of any significance may not be clear, but the iteration or insertion, rather, in section 1724, of the requirement that the Council should consent, would seem to indicate that it was intended to make full provision in this section alone for such appointments, and we think that the requirement of sec. 1711 as to the voting and recording of votes does not apply to this case. There must be, however, a *consent* to the appointment on the part of the Council, and according to the authorities cited by counsel for the respondent, such consent must be manifested by some affirmative act and mere silence or failure to object on the part of the Council is not sufficient. Whether or not there was a direct vote upon the question of confirming the appointment of Palmer in July, 1892, was a matter regarding which the evidence before us in the trial was conflicting, and we think there was

not a preponderance of the evidence that such direct vote was had but the weight of the evidence was otherwise.

Can the requisite consent be given by the Council otherwise than by a vote upon the express question of consenting to such appointment? If we were permitted to determine this fact of consent by giving effect to those things by which the condition or state of the minds of men is usually determined in legal proceedings, there could be no hesitation in declaring that the Council did consent to his appointment, since without the sign of objection by anyone, Mr. Palmer upon being appointed took his seat as Councilman and became an active and frequent participant in the proceedings of the Council and so continued for a year and three quarters or more, and was always in every way recognized as a member, his name being on the rolls and called for each vote taken by yeas and nays; he introduced resolutions, seconded motions, served on committees, made reports to the Council, which were accepted and adopted and during the entire period when meetings were held almost weekly, his voice, his vote and his presence were always recognized by the other members of the Council, and his rare absences were carefully noted by the clerk upon the minutes which the Council approved.

We have looked through the records of the Council offered in evidence to see whether by any an affirmative action it has mani-

festated its consent to Mr. Palmer's appointment. The Council were not required to take action upon the appointment directly as it was made, but when the appointment was made before the Council, it could then act, or defer action upon it, and it was competent for it to act upon the matter until the Mayor or the force of circumstances had withdrawn the nomination. Until withdrawn and before action upon it the nomination was a continual proposition before the Council for its action, but, whenever it gave the requisite consent in the requisite way, it could not thereafter undo its effect, nor oust one who thus became a *de jure* member, except in the manner provided by statute for his removal. We think that it is not absolutely required that the consent of the Council should be expressed by actual vote upon the direct question of approving the Mayor's choice, if it be plainly and affirmatively given.

Does the record of the proceedings of the Council sufficiently exhibit such affirmative action consenting to Palmer's appointment?

We think it does.

On August 15, 1892, the clerk being absent, the Council itself elected Mr. Palmer as clerk, *pro tempore*. By section 1755 this selection could only be of one of the members of the Council. So that at least thus early after his appointment, Mr. Palmer was by affirmative vote of the Council recognized directly as a member, and though the vote was not expressly upon the question of his membership it

was a sufficient declaration that the Council *consented* that he was then a member, and the appointment being made in the presence of the council, its members knew that his only claim to a seat was by virtue of that appointment which only needed their consent, in session given, to make it effective. Again; It was the duty of the clerk (sec. 1755) to record the proceedings of the council, and it was a proper if not a necessary part of the record of each meeting that it should state the members present. During the time while Palmer served as councilman, the council met very frequently, on an average as often as once a week, and the clerk in the record of each meeting gave the name of Palmer as one of the members of the Council either as present or absent, (and he was almost invariably present,) and such record was approved by the Council at its next meeting, as shown by its records.

The Council consisted of six members and, of course, under the provisions of sec. 1693, it required four affirmative votes for the passage of legislation (unless the case fell within the exception provided in that section), and on many occasions after the appointment of Palmer in 1892, beginning as early as Sept. 5, 1892, only four members of the Council, including Palmer, were present at meetings when resolutions and ordinances of great importance were passed by yea and nay vote, all of said four present being recorded as voting aye; certain of the ordinances thus passed appropriating large sums of money

out of the corporation treasury, and others making assessments for improvements &c., and the record of such meeting and proceedings being approved by the Council at the next subsequent meeting.

On April 17th, 1893, at the organization of the Council for that year, the Mayor appointed Palmer on certain of the standing committees, and chairman of one committee thus clothing him, apparently at least, with the great and serious powers which, under section 1687, may be exercised by such chairman and committee, and this appointment seems to have been approved by the Council.

On April 24, 1893, Palmer's committee having reported to the Council on a certain matter, Palmer moved to re-commit it to the committee and his motion was carried by a yea and nay vote recorded on the records, showing six council men (of course, including Palmer) voting yea.

Again on November 20th, 1893, in the absence of the Mayor from the Council meeting of that date, the Council chose Palmer as its temporary chairman, and under section 1675, such person appointed to temporarily take the place and perform the duties of mayor must himself be a member of the Council.

It may be said that all this was merely the recognition of Palmer as a *de facto* member of the Council and should not be regarded as equivalent to a vote directly upon his confirmation, but considering that his *de facto* character only needed at any moment after his appoint-

ment, the *consent* of the Council in order to make his position *de jure*, such affirmative action of the Council itself, ought to be allowed a broader significance, and, we think, fully shows the *consent* required by section 1724, if not the "advice and consent" which under section 1711 and 1713 in case of certain officers must be shown by ye and nay vote recorded on the journal.

Such being our conclusion, it is unnecessary for us to consider the arguments as to the Mayor's power to vote in case of a tie upon the question of the confirmation of his appointee, Mr. Darby, or whether, had there been a vacancy in April, Mr. Darby might be ousted at the suit of the State on the relation of Palmer, for, there being no vacancy to fill, and Mr. Palmer the *de jure* incumbent until his successor is elected and qualified, the appointment of 1894 even had it been confirmed with the utmost unquestionable formality, would have been ineffective to confer any right upon Darby. Judgment of ouster against Darby and for the induction, or rather the restoration of Palmer, will be entered at the costs of the respondent, Darby.

Hurd, Brumback & Thatcher, for Relator.

Doyle, Scott & Lewis and W. W. Touvelle, for defendants.

CONVEYANCES.

(In Common Pleas Court, Perry County Ohio.)

Lewis Stoltz, Plaintiff, vs Eli Vanatta, et al, defendants. Decided July 16, 1894

1st. Parol evidence is not admissible to convert a deed, based on no valuable consideration, or one merely nominal, into a deed for value, so as to defeat an existing attacking creditor or give such creditor a preference over him.

2nd. A court of equity will not reform an ineffectual voluntary conveyance so as to give one creditor preference over another creditor where their equities are equal.

3rd. A court of equity will not reform a deed, on an allegation of mutual inadvertence of parties to the transaction, for the purpose of making such preference.

HUFFMAN, J.

The plaintiff in this case brings his action to set aside a deed made by the defendant, Eli Vanatta, to John Vanatta, and a deed made by said John Vanatta to Hannah Vanatta, the wife of said Eli. These deeds were both made and dated January 20th, 1892. The petition alleges that the deed of Eli to John was made on the consideration expressed therein; that said John should immediately convey said premises to said Hannah and the consideration expressed in the deed of John to Hannah of One dollar. Said petition sets up a judgment recovered by Stoltz against Eli Vanatta, at the February Term of this Court, 1894, for the sum of \$581.10; that said judgment was recovered upon a promissory note made by said Eli to Stoltz on September 15th, 1883; that said Eli was the owner of said real estate from August 26th, 1873; and that after he made said conveyance to his wife, he had no property left subject to execution; and said conveyance was in fraud of his rights as such creditor of Eli.

The joint answer and amendment thereto filed by said Eli and Hannah, admit the recovery of said judgment; that it was for the debt alleged; and that said Eli at the time of the conveyance to his wife

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was unable, except for said real estate, to pay his debts. The petition alleges the value of said real estate to be \$2,000.00, and the answer admits it to be \$1,600.00. The answer and amendment admits the consideration expressed in said deeds to be as alleged in the petition, and set up that by the mutual inadvertance of the scrivener and said Eli and Hannah certain other considerations set out in said answer and amendments are not expressed or named in either of said deeds; but allege that there was other and different considerations from those named in said deeds, which are averred to be the release of a mortgage and other indebtedness of said Eli to Hannah.

To this answer and amendment thereto the plaintiff demurs. In support of his demurrer the plaintiff claims that this deed, being a voluntary conveyance and covering all the property said Vanatta had, is *prima facie* fraudulent, and that it can not be contradicted by parol evidence; that the Vanattas can not show another and different consideration than that named in the deeds. The defendants claim that the deeds can be contradicted and that they may show that the deeds are not in fact voluntary; but that they may show that another and different consideration passed than that named in the deeds; that deeds may be contradicted which on their face and by their terms are voluntary, may be shown to be deeds for value, and the consideration shown, and that, against this creditor who now attacks them for fraud.

On the solution of this question the ruling upon the demurrer depends.

The first named deed has no consideration expressed in it whatever. It simply states that it is made to John Vanatta in consideration "that he will immediately

convey the same to Hannah Vanatta." The other from him to Hannah is made in consideration of one dollar. One dollar is not a valuable consideration for property confessedly worth \$1,600.00. I think such a consideration for property of that value is universally nominal, and I also think that the rules may be considered settled, at least in Ohio, that under such circumstances as exist in this case a change can not be made from one kind of consideration to another by parol.

In the case of *Burrage's, Lessee vs. Beardsley*, 16 Ohio, 438, the Court, on page 442, say: "Love and affection is a good consideration for a deed. The grantor, however, did not profess to have conveyed upon any consideration of that kind. The grantees did not receive the deed upon those terms, but in consideration of Three Thousand Dollars paid, or to be paid; and as between the grantor and grantees, what the deed expressed, was the evidence of their contract.

Neither sound principles, nor the statute of frauds and prejuries, would permit them to alter or vary it by parol. It would introduce a rule productive of great mischief, to permit a written instrument of so solemn a nature as a deed of bargain and sale, to depend upon the inventive recollection of any witness, and to allow titles to be set up by oral testimony, in opposition to the written and recorded evidence required by statute. So far from being unfounded in reason, it would be difficult to imagine anything more directly in conflict with reason and principle, than to permit a deed thus assailed to be set up, by proving it false upon its face."

And the Court, on page 443, quoting from 11th Wheat, 213, says: "Had the evidence been offered for the purpose of showing that the deed was given for a

valuable consideration, and in satisfaction for the debt due from the father to his son, and not for the consideration of love and affection, as expressed in the deed, it might well be considered as contradicting the deed. It would then be substituting a valuable for a good consideration, and a violation of a well settled rule of law, that parol evidence is inadmissible to substantially vary a written agreement."

The case of *Patterson vs. Lamson*, 45 O. S., 77. In third proposition of the syllabus and last of page 89, and first of 90, the Court lay down the rule to be that the recital in such deed, if a named sum of money, so far concerns the operation and effect of the deed, as that it is not competent to show by parol proof that such instrument is in fact a deed of gift from a person not named in it, and that the named consideration was in fact paid by him.

In *Holmes vs. Sullivan, et al.*, 14 *Law Bulletin*, 167, decided by Judge Wright, of the Miami Common Pleas, in a case directly in point and well considered, announces the same doctrine.

The case of *Houston vs. Blackman*, 41 *Am. Reports*, 756 (66 Ala. 559), has this syllabus, "A deed of lands from husband to wife, expressed to be in consideration of love and affection, and one dollar paid, is voluntary as to then existing creditors of the husband, and if assailed by them, parol evidence is incompetent to show valuable consideration."

And on page 759, quoting from the 16 Ala. page 90, the Court say: "Here the deed sets out the consideration on which it purports to have been executed, to-wit, the anxiety of the grantor to provide for his wife, and one dollar in cash paid. The proof would establish that the deed was executed in conformity to the under-

standing entered into by Dorsey, at the time the negroes were delivered to him. This is a consideration entirely different from that mentioned in the deed, and parol proof cannot be received to establish it without violating the well settled rules of evidence."

Wait on fraudulent conveyances, Section 221, lays down the same rule in clear and explicit terms.

The position which the defendants occupy in this case is that of asking a Court of Equity to reform a deed, so as to convert a voluntary conveyance into a deed for a valuable consideration. By the deed as made this creditor has a right to come into a court of equity and have it set aside, and the property appropriated to the payment of his debt. Will such court on the application of the parties to the deed change plaintiff's status by converting a deed from a voluntary conveyance into one of value, at the instance of a party who has, to say the least, no greater or better equity than he? Will a court of equity by its action give to the wife of this debtor a preference over the creditor whose rights are at least equal to hers, by making for her now an instrument to effectuate that purpose? Equity is equality, and if a court of equity should by its decree make an instrument other and different from that which the parties themselves had made, and by such change give the party in whose favor such change is made a preference over another creditor not given by the instrument as executed by them, the well known rules and principles of such courts would surely be violated, and instead of the Court sitting to work out equity and equality between the parties, it would sit for the purpose of giving one party an advantage over the other.

That it will not and ought not to do so

is established by an unbroken line of authorities.

In the case of *Anderson vs. Tydings*, 63 *American Decisions*, 708, (8 Maryland 427), the Court in the first and second propositions of the syllabus say: "Debtor may give preference to one creditor over another, if the instrument intended to effect that object contains the requisite provisions. But if by mistake of law, the parties adopt such an instrument as can not effect their intention without the aid of a Court of Equity, the Court will not correct the mistake by reforming the instrument, to the prejudice of the general creditors of the debtor, in very embarrassed circumstances.

"Court of Equity will not deprive creditors of legal advantage which they have by reason of a mistake of law in the drawing of a deed, by reforming such deed for the benefit of parties who have no stronger equity than they."

In *Henderson vs. Mayhew*, 41 *Am. Dec.* page 434, (2 Gill. Md. 393), the Court say: "Parol evidence is inadmissible to change or contradict the terms of a written instrument. Strangers to the instrument, when authorized to impeach or contradict it, may offer parol testimony for that purpose: and so a grantor may, in a controversy with the grantee, if he charges the same to have been obtained by fraud or mistake. But the parties to a written instrument are not permitted, in controversies with strangers, to insist that it does not express what it was intended to express."

In *Hunt vs. Rousmaniere's Adm'rs*, 1. *Peters*, page 1, last paragraph of opinion, that Court in speaking of the case before them say:

"If the Court would not interfere in such a case, generally, much less would it do so in favor of one creditor against the general creditors of an insolvent estate, whose equity is, at least, equal to

that of the party seeking to obtain a preference, and who, in point of law, stands upon the same ground with himself."

The text books and decisions also hold, that equity will not relieve when the deed is voluntary.

5 *Lawsons Rights and Remedies*, Section 2307.

2 *American St. Reports*, page 343.

18 *American Decisions*, page 573.

"Neither will equity relieve a person from erroneous acts and omissions resulting from his own negligence."

Pomeroy's Equity, Section 839, page 1159.

In conclusion I desire to refer to the language used by Judge Gaston, in the case of *Wilkinson vs. Wilkinson*, 2 *Dev. Eq.* 377, in considering this question, he said: "Written instruments are to be regarded as the authentic and permanent memorials which the parties pass deliberately, appointed to testify to all, and forever what they have done. Parol evidence is in its nature less satisfactory. It may be tainted with falsehood, perverted by ignorance, prejudice, favor, or mistake, and is liable to mislead, because of the weakness of human memory. It is not to be questioned, but that the general rule, which declares parol evidence inadmissible, to contradict or substantially to vary the terms of a written instrument, obtains in a Court of Equity equally as in a Court of law. The consideration upon which a deed is made, is an important part of the contract; and when it is distinctly declared, parol evidence is not more admissible to contradict or substantially to vary that, than any other term upon which the parties have thus expressed their agreement."

Applying to this case, the principles laid down by the authorities and well known rules of both law and equity, the defendants' pleadings do not constitute a defense, and this Court is not authorized to grant them the relief they ask for.

The demurrer is therefore sustained.

Cochran & Powell and Ferguson & Johnson, attorneys for plaintiff.

W. E. Finck, W. E. Finck, Jr. and Owen Yost, attorneys for defendants.

Toledo Legal News.

OFFICIAL LAW JOURNAL OF LUCAS COUNTY, OHIO.

In the matter of the designation of a daily Law Journal in Lucas County. As required by Sec. 1 of an Act passed April 14th, 1884 and amended Feb'y 25, 1896, entitled "An Act relating to the posting of court calendars and legal notices in certain counties," as amended May 9, 1894, the Judges of the Courts of Record in said County other than the Circuit Court, hereby jointly designate the TOLEDO LEGAL NEWS, a daily law journal published in said County, as the journal wherein until the further order of said Judges, shall be published all the notices, advertisements, abstracts and matters and things specified or referred to in said Section 1.

Approved { GILBERT HARMON,
REUBEN C. LEMMON,
ISAAC P. PUGSLEY,
Judges of Common Pleas.
I. I. MILLARD, Probate Judge.

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SATURDAY, AUG 18, 1894.

The question of allowing the taxation of attorney fees, against the City, in cases where suits are brought on assessments which prove to be illegal or invalid, is among the subjects of recent adjudication in Toledo, and elsewhere in Ohio. Although the Courts seem to have had different views on the subject, it may be said now that the weight of authority in Ohio is against allowing the collection of attorney fees in such cases. Not long ago Harmon, J. held in *Goulden vs City of Toledo* (see LEGAL NEWS, vol. 1, No 1, page 11, weekly) that a reasonable allowance for counsel fees might be recovered. In that decision the Court refers to the conflict of authorities in different states, but, it would seem, relied principally upon a decision of the Superior Court of Cincinnati, general term, by Force, J., which held that counsel fees might be allowed in the measure of damages for delivering an invalid assessment. More recently, (in June—see TOLEDO LEGAL NEWS, Vol. 1, No. 10, weekly,) the Circuit

Court of Hamilton held that it was error to include a charge for attorney fees in a judgment against the City of Cincinnati for the amount which plaintiff failed to recover on account of an invalid assessment. This latter ruling is now accepted here as the better doctrine as appears from the following decision, by Lemmon, J., in *Gates and Hueston vs the City of Toledo*, opinion July 7th, 1894.

The present case also includes another phase of the question, being an action to recover attorney fees in a case where only a portion of the assessment was invalid.

The Court said :

This is a demurrer to the petition; the petition stating, perhaps, all the necessary averments—with one or two shortages—of which, perhaps, I may remind counsel. The relation of the matter is a historical statement of the proceedings of the city council whereby they, under the statute in regard to sewers and drainage, laid off a sewer district and provided for certain main and lateral sewers. This is recapitulated and it is then stated that in pursuance of this plan of sewerage, the city advertised for bids upon certain work; and it specifies that bids were made and that a contract was entered into between the city and the plaintiff in this case—Gates, &c. and that they proceeded to construct the sewer in accordance with the plans and specifications adopted and approved by the city council through its various bodies; that this work was accepted by the city, &c., and that thereupon an assessment was made upon the property benefitted, according to benefits. The petition then proceeds to state the owners of the property and describes the property which they owned which was found to be benefitted by the drainage, and there is a long statement of these matters. It then proceeds to say that an assessment was made upon the property for the benefits which were found to have accrued to the property and been received by the property from this drainage and specifies the property and the amounts of the assessments. It alleges that these assessments, being unpaid,—by the terms of the ordinance it was fixed that the pay-

ments should be made at such and such times, and from time to time—and it specifies that these payments not being made, suit was brought in the Court of Common Pleas, and that a decree was made there, and from this decree an appeal was taken to the Circuit Court; and that, in the year 1889—I think—the Circuit Court heard the matter upon appeal and rendered a decision. And it specifies that decision. And right there there is an uncertainty, I think, as to the amount which was left unpaid to the contractors. The Circuit Court in fact found certain amounts valid assessments against these parties, some of them, and I remember no statement in the petition of the amount of assessments which were unpaid, but only the fact that there were assessments unpaid. We think it should be made more specific in that respect. I do not gather from the reading of it the certainty that should be there. It then finally states that for so much as is lost of this assessment the parties have been subject to expense, to-wit, for the hiring of counsel; and this action is brought wholly for the purpose of recovering an amount of some twelve hundred dollars which it is claimed has been expended in the hiring of counsel. There is no specification in the petition, that I have the least recollection of, as to these services being rendered wholly in the attempt to collect the uncollected portion of the assessment. Of course, whatever services rendered in the making of collections which were successful, you have no right to recover for. That would be conceded, I guess.

MR. BROPHY.

If we had collected the whole of any assessment I would concede that.

THE COURT.

We do not think you have a right to recover on this petition for any work by the hiring of counsel. We think it is manifest that it was in contemplation not only of the city but of the contractors, that they were to collect this and this is their expense. If they had been successful in collecting these you will concede that they would not have had any

right to collect of the city the expenses which they had been put to. Well, now, they have been put to no greater expense because of their failure to collect them. They have now collected of the city. Presumably they have been paid by the city and they have been indemnified. They are getting the amounts of their assessments; they are getting the contract price in part from the property owners and in part from the city, and now, because they don't get it all from the property owners, they are seeking to get the money which they have been compelled to expend in the hiring of counsel. Counsel may have been necessary to be hired and expense undergone although every item was collectable. Parties owning property against whom assessments have been made, we may presume it was foreseen by both parties, that they might not be willing to pay and that these amounts would have to be collected. Now we do not think that, the fault of the parties, in any way attributable to the city—at least this petition don't show this, except perhaps that the city had made a mistake in the supposition that this property needed these additional drainage facilities—I don't think, however, that it is a case in which it can be said that the city by contract have pledged themselves to pay for counsel fees, and I am quite unwilling, until it has been determined by a court that controls this, that such liability has been incurred on the part of the city. I am unable to hold that there is a liability on the part of the city. The question has been reached, it seems, in Cincinnati, and there the court of review held that it was error to include a charge for attorney's fees in a judgment against the city of Cincinnati for an assessment which they were unable to collect. The direct question was before that court, and we think that their decision was a correct one. While it is not, of course, clear, it is one of those first impressions that we get. I have given it all the thought that I could, and I am disposed to say that there is nothing here that in my judgment would warrant a judgment against the city upon the facts stated in the petition. The ruling therefore will be to sustain the demurrer to the petition.

Plaintiff excepted and took 30 days to file amended petition.

Stephen Brophy, for Plaintiff.

C. F. Watts, City Solicitor for City.

DOW TAX.

(Court of Common Pleas of Lucas County,
Ohio, April Term, 1892.)

32396—James Stevenson vs Samuel A. Hunter, Treas.

1. In an action to recover back money paid to the County Treasurer as an assessment upon the business of trafficking in intoxicating liquors under the "Dow Law," the tax duplicate is PRIMA FACIE evidence of every fact which is necessary to authorize the assessment, including the fact that the plaintiff was engaged in the business of trafficking in intoxicating liquors.

2. An assessment can be lawfully made under the "Dow Law" upon the business of trafficking in intoxicating liquors in a township which has voted against the sale of intoxicating liquors under the "Township Local Option Act" of March 3, 1888.

PUGSLEY, J.

This is an action of replevin that was tried to the court, a jury being waived. The undisputed facts are as follows: On the 5th day of May, 1888, a special election was held in Providence township, in this county, under the provisions of the act passed March 3, 1888, commonly known as the "Township Local Option Act." A majority of the votes cast at said election were against the sale of intoxicating liquors, whereby it became unlawful for any person within that township to sell any intoxicating liquors to be used as a beverage, or to keep a place where such liquors are sold. On the 1st of October, 1891, and before any other election under the act was held in Providence township, the auditor of the county received information that the plaintiff, James Stevenson, was engaged in such township in the business of trafficking in

intoxicating liquors, and thereupon the auditor entered upon the duplicate the assessment against such business provided for by the act of May 14, 1886, known as the "Dow Law." The plaintiff was charged on the duplicate with having begun the business upon the 25th day of May, or the fourth Monday of May, 1891, and the amount of the assessment was the full sum of \$250. A few days thereafter, and on or about the 6th of October, the defendant, Samuel A. Hunter, who is the treasurer of the county, proceeded to collect the assessment, and was about to levy upon the goods and chattels of the plaintiff, under sec. 4 of the Dow Law, when this arrangement was made between them; the plaintiff signed a written statement in the form of an affidavit prepared by the auditor, reciting that from the 25th day of May, continuously to the 1st of October, 1891, he was engaged in the business in trafficking in intoxicating liquors, and that on the 1st of October he discontinued such business; and thereupon there was abated from the assessment the ratable proportion for the unexpired part of the year after October 1, leaving a balance claimed to be due upon the assessment, with penalties, of \$117.44. On the same day the plaintiff deposited with the

defendant the sum of \$113 in coin and currency, and took a receipt which recites that this sum is received by the defendant as a special deposit "on account of the plaintiff's liquor tax and penalty." The money was deposited with the defendant to prevent the levy proposed to be made by the treasurer, and to secure the payment of the assessment. It was agreed between the parties that the plaintiff would take legal advice, and if he decided to contest the assessment he would notify the defendant, and take such legal measures as should be deemed advisable to obtain a return of the money. It is proper to say that while the plaintiff in conversation with the officer admitted that he had sold cider and native wine and sweet wine, he denied in such conversation that he had sold intoxicating liquors. The plaintiff took legal advice, and, acting upon that, he demanded of the defendant a return of the money, and this being refused, he brought this action of replevin before a justice of the peace, and from the judgment of the justice an appeal was taken to this court. The money was not taken from the defendant, and the action proceeded under the statute as one for the recovery of damages.

The petition alleges that the plaintiff is the owner and entitled to the immediate possession of this

money, specifically describing it, and that it is wrongfully detained from him by the defendant. The prayer of the petition is, that the plaintiff may have judgment for the delivery of the money, and in default of said delivery, that he may have judgment for the sum of \$113 and interest. The answer is a general denial.

The question involved is as to the legality of the assessment, and is the same as it would be if the plaintiff had paid the money to the defendant, as Treasurer, under protest, and to prevent the seizure of his goods, and had then brought an action to recover the money back. In such an action to recover the money, it would be incumbent upon the plaintiff to show that the assessment was illegal. So in this action the burden is on the plaintiff to establish the allegations of his petition, viz: that he is the owner and entitled to the immediate possession of the money, and that it is wrongfully detained from his possession by the defendant. The money was voluntarily deposited with the defendant to pay or to secure the payment of the assessment. Under the arrangement which was made between the parties, the defendant is lawfully in possession of the money until it is shown that the treasurer has no right to appropriate the money to the payment of

this assessment. The burden is therefore upon the plaintiff to show the illegality of the assessment. This becomes material principally with reference to the question of fact as to whether the plaintiff, between May and October, 1891, was actually engaged in the business of trafficking in intoxicating liquors. If he shows that he was not so engaged, then the legal presumption in favor of the validity of the assessment is overcome by that fact alone, and in that case the assessment should be held to be unauthorized. Upon the trial of this case the plaintiff offered no evidence upon this subject; although he was present in court, and although the fact was within his knowledge, he was not called as a witness. The defendant offered in evidence the duplicate and the admissions and the affidavit of the plaintiff already referred to, and this was all the evidence upon the subject. The law makes the duplicate *prima facie* evidence of every fact which is necessary to authorize the assessment, including the fact that the plaintiff was engaged in the business of trafficking in intoxicating liquors; and in the absence of any denial on the part of the plaintiff that he was engaged in the business, and in the absence of any evidence tending to show that he was not so engaged, the effect which the law gives to the official

action of the auditor in making the assessment must prevail. The question of fact referred to, therefore, must be decided against the plaintiff.

The important question, and the one about which there is the most serious contention, is whether the Dow tax can be lawfully assessed upon the business of trafficking in intoxicating liquors in a township which has voted against the sale of intoxicating liquors under the Local Option Act. It is contended on the part of the plaintiff that the right to tax the business ceased when, by the action of the voters of the township, the business became unlawful; that the only penalty to which the person carrying on the business is subject is that of fine and imprisonment; that the payment of the tax does not exempt him from the penalty, or protect him in carrying on the business, and that taxation without protection is unauthorized, and cannot be sustained. On the other hand it is contended in behalf of the defendant that by the Dow law, an assessment is required to be made in all cases upon the business of trafficking in intoxicating liquors, and the assessment must be paid by every person engaged in such a business; that this absolute requirement is not in any way qualified by the local option law; that the idea of protection to the business is not involved in the taxation of the liquor

traffic, and that one engaged in, the traffic cannot plead a violation of the law, or his own wrong, to excuse him from paying the tax.

By the Dow Law, every person engaged in the business of trafficking in intoxicating liquors is required to pay annually a tax upon the business. A person who carries on the business in violation of the law is not excepted. The sole fact that the business is carried on authorizes the levying of the tax, and there is no provision of the local option law which exempts any dealer from the payment of the tax. But the claim is that the state has no power to tax a prohibited business, and that therefore it must be presumed that the business of selling liquors when prohibited is not included within the provisions of the Dow Law, and that the law should be construed as if the prohibited business was expressly excepted. The argument against the existence of the power to tax an illegal business is, that when a business is taxed, some idea as to a protection to that business is necessarily involved—in other words, that taxation and protection are reciprocal; and inasmuch as the payment of the tax does not legalize the business nor relieve the dealer from the penalty imposed for a violation of the law, that the tax cannot be sustained. At first blush

there seems to be some force in this argument, and it may be that there are occupations, or trades, or kinds of business which are so pernicious or contrary to good morals, or so detrimental to the best interests of the community, that the state ought not to even appear to countenance their existence by taxing them; and this may be true even in cases where the business is not prohibited by law; but the notion that the liquor traffic is sanctioned by taxing it disappears at once, when it is considered that in this State the tax is imposed, and can only be sustained under the constitution, because it is a means of providing against the evils resulting from the traffic. No idea of protection is involved. The state, finding the traffic in existence, and disapproving it, taxes it, both for revenue and to diminish the evils resulting from it. And the evils resulting from carrying on the traffic when it is prohibited are certainly as great and as necessary to be provided against as when the traffic is unrestrained. The idea that protection is due to the business because of the tax can have no place in the law. If this were so, the law would be in contravention of the no-license clause of the constitution. Where there is no prohibition, the dealer is allowed to carry on the business, not

because he pays the tax, but because the state has not exercised its right to prohibit the business; and if the tax is not paid, the business is not thereby rendered unlawful; the tax may be collected the same as other personal taxes; that is all. In no sense, therefore, can the business be said to be protected by the payment of the tax. The penalty imposed for carrying on the business when prohibited is simply punishment. To say that a person who engages in an illegal business may be fined and imprisoned, although he pays the tax, is simply to say that he may be punished for violating the law, which is just, and gives him no ground of complaint. He cannot be heard to say that because he has violated the law and may be punished therefor, he ought not to pay the tax.

This subject was very fully considered by the Supreme Court of Michigan in the case of *Youngblood vs Sexton*, 32 Mich., 406. That was a case which involved the validity of a law of Michigan providing for the taxation of the liquor traffic. The gist of the decision upon this point is contained in this paragraph of the syllabus:

A business is not necessarily licensed or protected because of its being taxed; nor does taxing a business imply an approval of it. On the contrary, it is competent to tax an illegal business, and a tax

on a business not prohibited is often, where police purposes are had in view, a means of expressing disapproval of it.

There is a very full discussion of this branch of the case in the opinion of the Court, which was delivered by Judge Cooley, and his reasoning seems to me to answer all the objections that are urged to the right to tax the liquor traffic in a township where the traffic is prohibited by law.

It was held by the Supreme Court of the United States in the "License Tax Case," 5 Wal., 462, that the Congress may lawfully impose special taxes upon the business of dealing in liquors, and enforce the payment of the tax by suitable penalties, although the business is prohibited by the laws of the state where the business is carried on. And it was further held that the payment of such a special tax confers no authority to carry on the business. The Court say:

There is nothing hostile or contradictory in the acts of Congress to the legislation of the states. What the latter prohibits, the former, if the business is found in existence notwithstanding the prohibition, discourages by taxation. The two lines of legislation proceed in the same direction and tend to the same result. It would be a judicial anomaly as singular as indefensible, if we should hold a violation of the laws of the state to be a justifica-

tion for the violation of the laws of the Union.

The principle of that decision is applicable to the case at bar. The Dow Law subjects every person carrying on the business of trafficking in intoxicating liquors to a special tax. The local option law prohibits the carrying on of the business in a township which has voted against it. There is no inconsistency between those two laws. If, notwithstanding the prohibition, the business is carried on, it would be an anomaly to hold that a violation of the law relieves from the payment of the tax. The result would be that those who are lawfully engaged in carrying on the business must pay the tax, while those who carry on the business in violation of the law are exempt. This would be putting a premium on disobedience to the law. It is no answer to this to say that the person who violates the law by carrying on the prohibited business may be punished by a fine and imprisonment. The tax is imposed, not to punish him, nor, on the other hand, in consideration of any protection due to the business. The business is not protected, but his property and the fruits of his business are protected, and in consideration of this, the general benefits of government, he should pay the tax the same as all law-abiding citizens.

By sec. 4 of the local option act

it is provided that if a dealer in intoxicating liquors who has paid the Dow tax shall discontinue the business by reason of the vote, a ratable part of the tax for the unexpired portion of the year shall be refunded to him. The tax is not to be refunded unless the business is discontinued. It is lawful, therefore, to retain the tax so long as the business is carried on, although the business is prohibited by law, and although the person carrying on the business is subject to fine and imprisonment. It is true that in the case stated the business is lawful when the tax is levied and paid; but if the state may justly and legally retain the tax without affording any protection to the business, it would seem to be equally lawful and just to levy the tax without such protection. In the one case the dealer may secure the return of the tax, by obeying the law and discontinuing the business; in the other case, he may avoid the imposition of the tax by obeying the law and abstaining from the business. In neither case could the dealer complain of any hardship because of the tax.

Judgment in this case therefore, will be rendered for the defendant.

J. W. Ritchie for plaintiff.

J. A. Barber, Pros. Atty., for defendant.

(The foregoing judgment was affirmed by the Circuit Court for the Sixth Circuit.)

FELONY.

Trial—Presence of Accused. Deliberation of Jury. Review of Facts as to Whether or not Verdict Was Sustained by Evidence.

(Sixth Judicial Circuit, Erie County. May Term, 1894. Present, Hon. C. S. Bentley, P. J.; C. H. Scribner and G. R. Haynes, J.J.)

Edward Bennett vs. the State of Ohio.

(1)—While some Courts have allowed the defendant in a criminal case a large latitude in cross-examination, the general rule is that he must not go into those matters which are purely matters of defense. So held.

2—On the trial of a felony the accused has a right to be present in Court when any proceedings, of whatever nature, save the secret deliberations of the jury, are taken in his case.

3—The accused is entitled to have the deliberations of the jury continue undisturbed and uninterrupted with and it is error for the judge, during the enforced absence of the accused, to hold a conversation with the jury which might influence their verdict and prevent the defendant from having a fair trial in the case.

4—The presumption of law is that where error has intervened in a criminal case it is prejudicial to the defendant.

5—To authorize a verdict of murder in the second degree it must be affirmatively shown by the State, that there was at the time the blow was given an intent existing in the mind of the accused to kill the person whose life was taken; that he not only delivered the blow with intent to kill but did it maliciously and with murderous purpose in his heart.

6—Evidence that a stab was given in an affray, growing out of a sudden quarrel, which caused death, does not warrant a verdict of murder in the second degree. [Other Judges not concurring in the conclusion drawn from a review of the facts.] **ED. LEGAL NEWS.**

HAYNES, J.

In the case of Edward Bennett vs the State of Ohio a petition in error is filed here for the purpose of reversing the judgment of the Court of Common Pleas.

It appears from the record that Edward Bennett at the January Term of the Court of Common Pleas for this county was indicted for "That he did unlawfully, purposely and maliciously kill George M. Sullivan, then and there" being an indictment for murder in the second degree under the statutes of the State of Ohio. The case was tried by a jury and a verdict was rendered finding the defendant guilty of murder in the second degree, in manner and form as he stands

charged in the indictment. Thereupon a motion for a new trial was interposed, setting forth a large number of alleged errors which it was said had occurred at the trial of the case. That motion coming on for hearing was heard and overruled, and it was assigned for error here that the Court erred in overruling the motion for a new trial. The petition in error having been filed the case came on for argument here and has been argued by counsel, and three points are alleged as the main points of error in the case.

The first is that the Court erred in the admission of certain evidence or rather in refusing to admit certain evidence. More strictly that it erred by refusing to allow counsel for the defendant to propound certain questions to witnesses upon cross-examination which it was claimed by counsel were matters they were entitled to call out on cross-examination of the State's witnesses. The second is because of the alleged irregularity in the proceedings of the Court which I will refer to at more length hereafter, and the third is that the verdict is not sustained by sufficient evidence and is contrary to law.

In regard to the first error we will say briefly that the matters that were sought to be brought out on cross-examination were not so strictly within the matters subject to cross-examination as to call for any action on the part of this Court. Very much must be left to the discretion of the trial judge. There has been some difference of opinion and some variety of practice in this State as to the extent a party may go in cross-examination, and while some courts have allowed the defendant a large latitude in cross-examination the general rule has been that he must not go into those matters which are purely

matters of defence, and the Court following that rule of practice, here based his decision upon it. The matters that were sought to be brought out were afterwards brought out in proper course on examination of witnesses upon the stand and the defendant had the benefit of the testimony of those witnesses. In the action of the Court in that regard we see no ground of error, and no injury to the rights of the defendant.

The other two questions are matters of great importance, and matters to which we have given our attention at length and very earnestly. We have made a very careful examination of the testimony in the case and we have read it very thoroughly. The alleged irregularity of the Court is set forth in the bill of exceptions commencing on page 649 of the bill of exceptions and reads as follows:

"And thereupon at one o'clock and 29 minutes on the afternoon of said day, to-wit, the third day of February, 1894, the said jury retired to their room in charge of the sheriff for deliberation, and said defendant, Edward Bennett, upon the retirement of said jury was immediately, to-wit, at 1:30 p. m. of said day, under the order of said Court taken by the officer thereof to the county jail and committed thereto as a prisoner in the custody of said sheriff, and thereafter on the same day, to-wit, at the hour of five minutes to five o'clock in the afternoon, the said Edward Bennett at that time being confined as aforesaid a prisoner in said county jail, and having no notice thereof, and neither one of his attorneys being present in Court, or having any notice of the same, said Court ordered said jury again brought back into open Court, which was done accordingly; and

thereupon in the absence of said defendant, who was so confined in the county jail as above stated, and in the absence of his said counsel, neither one of whom was present in Court, or in the Court House, said Court interrogated and communicated with said jury as follows, to-wit:

"Gentlemen, I have called you in on my own account. I cannot get away to-night, unless I go very soon, and I would like to know the state of your deliberations, and whether you are likely to arrive at a verdict soon. Are you likely to come to a verdict within the next fifteen minutes?

"And thereupon the foreman of said jury, to-wit, one George Krapp said to said Court in answer to said interrogatory, as follows, to-wit:

"Indications point that way.

"And thereupon said Court further said to said jury, as follows, to-wit:

"I do not want to hurry you up unnecessarily, but I cannot get home at all for Sunday, unless I go very soon, and it is that I want to inquire about. I called you in for that purpose. If you are likely to come to a verdict you may retire again and resume your deliberations. Be as expeditious as you conveniently can.

"And thereupon said jury under the order of said Court were again taken in charge by the officer thereof, and again retired to their room for further deliberation.

"Neither the said defendant, Edward Bennett, nor his counsel nor either of the same having any notice or knowledge whatever that said proceedings, as above set forth, were had by said Court and said jury, but the said defendant during all of said time was confined as a prisoner in the jail of said county, as above stated.

"And at fifteen minutes past 5 o'clock,

in the afternoon of the same day said jury announced that they had agreed upon their verdict herein, and were thereupon again brought into open Court by the officer thereof with the verdict, which was returned and read in the presence of said defendant, and said jury were polled at the request of defendant's counsel, and each of the same answered that the same was his verdict. And the jury having found the defendant guilty of murder in the second degree in manner and form as he stands charged in said indictment, the defendant within three days thereafter made a motion for a new trial," and so forth.

It is very evident, to say the least, the action of the Court in bringing the jury in and having a conversation with them that it did was an improvident act on the part of the Court. The effect that is to be given to that action is the one that depends upon the principles of law that are laid down by the Supreme Court of this State and the general rules that should govern the conduct of jury trials. It is well known to the profession the 10th Section of the Bill of Rights of the Constitution of the State provides that the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witness face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy *public* trial by an impartial jury of the county or district, in which the offense is alleged to have been committed; nor shall any person be compelled, in any criminal case, to be a witness against himself, or be twice put in jeopardy for the same offense.

Some decisions have been made by the

Supreme Court of this State upon this subject and it may be well perhaps to refer to these for the purpose of refreshing our recollections as to some of the principles laid down by the Supreme Court. I shall not attempt to refer to all of the decisions that have been made but refer to one or two of the leading decisions.

In the case of *Jones vs The State of Ohio*, decided by the Supreme Court at the December term, 1875, and found in the 26th Ohio State, page 208, the defendant was indicted for the crime of murder in the second degree and was afterwards found guilty of manslaughter and sentenced to be imprisoned in the penitentiary.

On the trial, as the record shows, the case was submitted to the jury for their verdict at five o'clock in the evening, and the defendant was remanded to the jail of the county. At seven o'clock next morning the jury returned into Court and requested further instructions on points material to the issue. Thereupon, in the absence of the defendant, who was still confined in jail, the Court again instructed the jury on the points requested, "in tenor and effect as first charged." Shortly afterward the jury again returned into Court, and in the presence of the defendant returned the verdict of guilty as above stated. At the giving of the last instructions one of the defendant's counsel was present and made no objection.

The record does not show the nature of the instructions given, further than that they were material to the issue.

By the reporter of the Court in his statement of the case taken, we suppose, from the bill of exceptions, it is said that they were "in the tenor and effect as first charged."

"BY THE COURT.—We are unanimous—

ly of the opinion, that on the trial of a felony it is error to proceed, at any stage of the trial, during the enforced absence of the accused, save only in the matter of the secret deliberations of the jury, and perhaps in the hearing of motions after verdict and before judgment.

"It was the right of the plaintiff in error to be present at each and every instruction given to the jury as to the law of the case. This right was denied to him by reason of his imprisonment under the order of the Court; and without inquiry as to the correctness of the instruction so given in his absence, it will be presumed that he was prejudiced thereby.

"Nor was the irregularity cured by the presence of his counsel at the time the additional instruction was given, and his failure to make objections. The right of the accused to be present on the trial of such case can not be waived by counsel."

In *Cantwell vs The State*, in the 18th Ohio State, page 477, decided in 1869, the defendant had been indicted for grand larceny, had been placed upon trial, had been convicted, and a motion for a new trial was filed on the grounds that the Court improperly overruled certain matters and that the Court permitted the jury to separate during the trial. This motion was overruled and a new trial refused; and the first three points that were made were overruled by the Supreme Court, and the question came on for hearing on the fourth or last point, that the court permitted the jury to separate during the trial.

It is proper to say that at that time the 164th, section of the Criminal Code was in force, the Criminal Code of 1809 wherein it was provided among other things that "in the trial of felonies, the jury

shall not be permitted to separate, after being sworn, until discharged by the court." The jury in this case was permitted to separate from Saturday until Monday, and separated, without being under the supervision of an officer, and were separated by the consent of the defendant and his counsel as well as the counsel for the State. The Supreme Court say:

"It may be regarded as an established principle in this state, that the defendant can not be prejudiced by his waiver of any statutory requisition in the prosecution of criminal offenses."

The court further remarked:

"It was held by this court at the last term, in the case of *Parker vs the State*, before the code of criminal procedure was adopted, that it was error, to permit the jury, in a criminal case, to separate, after they had retired to deliberate, even though counsel for the defendant consent to their separation; and although it was not expressly decided in that case, it was strongly intimated, that the consent of the defendant himself would have left him in no worse condition; for it is said in the opinion: 'The plaintiff in error should not be prejudiced even by a personal consent, given under circumstances when it could not be withheld, except at the risk of exciting unkind feelings in the breasts of the jurors who held his fate in their hands.' This accords with what is said by Bishop in his work on criminal procedure, to be the better doctrine, 'the consent of the prisoner to a separation, which the general rules of law do not permit, should never be asked of him, and if it is asked and granted, or even granted without being asked, it will avail nothing.'

"But the errors alleged are predicated on the motion for a new trial, which was

based on the 192d section of the criminal code, and it is claimed that, under the provisions of that section it was not erroneously overruled, for the reason that the defendant was not thereby "materially" prejudiced in his 'substantial rights,' nor prevented from having a fair trial."

That section, which is now section 7350 reads as follows :

"A new trial, after a verdict of conviction, may be granted on the application of the defendant, for any of the following reasons affecting materially his substantial rights :

"1. Irregularity in the proceedings of the court, jury, prosecuting attorney, or the witnesses for the state, or for any order of the court, or abuse of discretion, by which the defendant was prevented from having a fair trial, etc."

They discuss the latter clause in the paragraph of this section :

"A violation of this right, (that is this right to have the jury kept together) in permitting the jury to separate and mingle generally with the community, without the restraining supervision of the proper officer, might, at least, subject them to influences prejudicial to him. The statute secured him against this hazard. It does not leave the defendant to the difficult task of proving, when the jury have been permitted to separate, that they have been improperly influenced, or have, in fact, been subject to such influences; for, however much he may have been prejudiced thereby, from the nature of the subject, it might be impossible to be shown, since, for reasons of public policy, jurors are competent only as witnesses to sustain, and not to impeach their verdict. The permitting the jury to separate did, therefore, affect materially a substantial right of the defendant.

The 'order of the court' permitting the separation was a violation of this right. It must, therefore, be admitted that he was thereby prevented from having a fair trial; for that can not be a fair trial, within the meaning of the statute, in which the defendant has been deprived, by order of the court, of a material safeguard secured to him by its positive provisions. The consent of the defendant to the order, as we have seen, does not mend the matter; for, in a case like this, the refusal of such consent might be more prejudicial to him than the separation of the jury, the evil provided against by the statute."

They further say :

"We arrive at the conclusion we have in this case the more cheerfully because, although it is not affirmed that all the evidence is set forth in the record, enough does appear to lead us to doubt that the defendant was properly convicted; and, therefore, in the absence of any other error appearing in the record, we may well apprehend that, by reason of the error complained of, the evils provided against by the statute may have influenced their verdict."

It is proper to say Judge White dissented from the decision in that case, holding that the action of the court did not prevent the defendant from having a fair trial.

I have cited these at length for the purpose of showing the general tenor and scope of decisions of the Supreme Court. It might have been followed by other decisions in which the court have set aside verdicts where the jury have been visited by one of the judges who simply stated what the court had already said to them, and by other cases which are familiar to the profession. The general rule, we

think, is clearly established, not only by the decisions of the Supreme Court of this state, but by the decisions of the courts of other states, and by the authority of legal writers of approved merit, that during all the proceedings of the court save and except when the jury are out for deliberation, the defendant has a right to be present in court when any proceedings, of whatever nature, are taken by the court in his case. The law is laid down so in Bishop on Criminal Procedure, cited here by the Supreme Court of this State, wherein that doctrine is broadly affirmed as a rule of criminal law to be followed by courts in criminal proceedings.

Giving this matter, now, a very careful consideration, and examining all the authorities that have been cited and all we can find upon the subject, we are constrained to the conclusion that the Court of Common Pleas erred in calling in the jury in the absence of the defendant and in holding the conversation that he did hold with them at that time, which conversation is set forth in the bill of exceptions.

But that of course does not entirely decide the case upon that point, for although it may have been an irregularity in the proceedings of the court, the question still remains whether it was such an irregularity as prevented the defendant from having a fair trial. That point has given us, perhaps, more trouble than the main question, but it will be seen from the decisions that I have cited—it will be seen as fully, perhaps, in many other decisions I have not cited but which we have examined—that the courts are very jealous in regard to any violations of these rules, and they do not cast upon the prisoner or the defendant in the case the burden of showing that he has been prejudiced.

For the reason stated in the case I have

just read in Supreme Court, it might be a very difficult thing for him to do, and if the jurors themselves are not allowed to testify it might be a thing that he would be deprived from doing, even although he might know that evidence existed among the jurors that might be of benefit to him.

Look at this case then for a moment. The defendant was put on trial for murder in the second degree, a matter affecting his liberty for life. His defense was that the homicide with which he had been charged was committed while he was in a quarrel, while he was being attacked, while he was retreating, and was committed by him in self-defense. It was further submitted to the jury that if it was not committed in self-defense it was at the most simply a case of manslaughter, and not a case of murder in the second degree. The court had charged the jury upon all these points and the jury had retired for deliberation. The fact of the stabbing was not practically denied. I believe it was not only admitted but the defendant himself testified to the fact, so that there could be no question as to the killing to detain the jury for a moment. The question evidently they were discussing during the time they were out—for three hours—was as to the grade of the offense, or whether any offense had been committed, or whether the stabbing that had occurred was not justifiable, or at least excusable on the ground that the act was done in self-defense.

Now, while their deliberations are in progress the court calls them out and makes inquiry in regard to the condition of their deliberations in the jury room, not whether they had agreed upon a verdict or not, but in what condition their deliberations were, whether they were

likely to agree upon a verdict soon, and said to them if he went home at all that night to spend Sunday he would have to go in the course of a very few minutes, and they replied that indications pointed towards an agreement of the jury, and he thereupon sent them back to the jury room with an admonition to "he as expeditious as you conveniently can."

Now the rights of a defendant in regard to the deliberations of a jury are well defined. It is provided, as I have read from the Constitution, that he shall not be put twice into jeopardy for the same offense. As corollary to that in the decisions of the courts in this state and other states the court has no right to discharge the jury until it appears clearly that there is no reason to suppose that they can agree upon a verdict. He has a right to have the deliberations of the jury continued unobstructed and uninterfered with until they have so thoroughly canvassed the case, so thoroughly made up their minds in regard to it, either by way of agreement one way or the other, or else by differing so essentially in regard to the conclusions to be arrived at that there is no prospect of one party or the other yielding. In case there has been sufficient deliberation and no hope of agreement the court is authorized then to discharge the jury, and the prisoner may be put upon trial again for the same offense.

The constitution also provides that he shall have "a speedy public trial," and that public trial is held by the courts to be a trial not only that is open to the public but a trial where he can be present; and he has the right under the Constitution also to meet the witnesses face to face and has a right to look in the faces of the jury during all the time the case is being heard; he has the right to

be present when the court charges the jury; he has the right to be present whenever any step is taken in the case which may in any manner or form be said to be a portion of the trial of the case.

We all know that jurors are sensitive to the influence of the judge. Too often they are quite anxious to learn what the judge thinks about the case, and gather from any hint or word he may drop and the action he may take in the case as to the probable view he takes of the case, and with jurors who stand in doubt that often has a very material effect. In this case the jury had not arrived at a conclusion; their deliberations were not finished, some juror or jurors in the room were differing from the opinions of some other jurors. Whether their deliberations were hastened by the fact of this admonition given by the court, or the thought that they might have to remain over Sunday if the Judge went away, or to what extent that would have influenced them we cannot say; the jurors would not be permitted to say if they knew. The presumption of the law is where error has intervened in a criminal case it is prejudicial to the defendant—has intervened against him. The burden is not cast upon him to prove the fact that it has been prejudicial to him, or to show whether it has been or not; and it seems to us that the conversation that was held by the court with this jury and his admonition to them were of such a nature that it might well disturb their deliberations, it might well affect to some extent the minds of a hesitating or doubtful juror, one who had not fully made up his mind upon any particular question, and we certainly are unable to say that it was not prejudicial to the defendant. We, therefore, are brought to the conclusion that not only did the

court err in this conversation it held with the jury but that it was of such a nature and character as prevented the jury from having free deliberation upon the subject and coming to their own conclusion in regard to the matter—at least that it might affect that conclusion and prevent, in the language of the Statute, the defendant from having a fair trial in the case.

We have said the action was undoubtedly improvidently taken. It was probably taken without the forethought which usually characterizes the conduct of the able judge who presided in the trial of this case. Nevertheless we are called to pass upon the act as set forth in the record according to our own judgment after a full and fair deliberation upon the facts and upon the law in regard to it.

I now approach the last alleged error, and that is that the verdict is against the weight of the evidence. The facts of the case are these in brief, Edward Bennett was a waiter at the Sloane house. Christ Parham was at the same time a waiter at the West House. They were both colored young men. They had been in the habit from time to time of going into a saloon upon Water street for the purpose of playing billiards, in a building that was adjacent to the West house. On the 20th, September, in the afternoon, they went in there to have a game of pool, and played two or three games. They were about leaving, but concluded to have another game. About that time Philip Kessler came into the room, and either with him, or immediately following him came William Sullivan, who is the person mentioned in the indictment as George M. Sullivan. They were both white persons. They concluded to have a game of pool, and made application to the proprietor of

the saloon for leave and he told them they could play a game, and thereupon they sought for the balls that are used in playing the game. When they got their balls they found a certain ball, which is called the flyer, gone, and this being a necessary ball, the proprietor told them to take one of the other balls, and they took a ball claimed by the colored boys. Thereupon a controversy quickly arose, between the two parties, the colored boys and Kessler and Sullivan, about the possession of one of these balls or the taking of it, and that led to blows and the throwing of billiard balls and shortly the attention of Mr. John Weidenhafer Jr., son of the proprietor of the saloon, was called to the trouble, and he interposed and told Kessler and the others to leave. Thereupon they started and went out, one after the other. The order of their going cannot be correctly stated, because the witnesses do not agree about it. They went out the back door and immediately after getting in to the back yard of the saloon Kessler and Parham engaged in a scuffle and Bennett, who had come out, was also soon engaged in a scuffle, or in a controversy, or quarrel with Sullivan, and Sullivan was soon after stabbed. He went back into the saloon, fell upon the floor, and expired within a very few minutes. He was stabbed by Bennett, as I have already said. There is no question about that. Now on what occurred outside, after the parties had left the saloon, hang principally the questions of fact and the law in this case.

That there was a controversy in the room there is no question; that a billiard ball was thrown and that Kessler was hit by one of the billiard balls there is no question. That Parham was struck in there, upon the arm with a billiard cue, I

think there can be no question from the evidence, but as to what was done by the respective parties, the witnesses do not agree among themselves. It is quite difficult, perhaps almost impossible, to come to an accurate conclusion as to all that did take place. Sullivan was standing at one side a little, and the witnesses Wiedenhafer Jr. and Kessler say that he was doing nothing. Parham says at one time Sullivan said to Kessler "Give it to him." That was about the time Kessler was attempting to strike Parham. John Wiedenhafer, Junior, says that Bennett threw two of the balls, and that one of the balls hit Kessler. Parham says he threw the balls at the time that Kessler struck him and because Kessler did strike him. Bennett, it is claimed, did not throw the balls. According to the testimony of Frederick Ferderer, an employee of the saloon, Bennett at the time the parties started out was standing with a cue in his hands, having both hands holding it, and he, Ferderer, said to Bennett. "Let me have that cue, we don't want any quarrel," and Bennett gave it to him. He took it and put it back in the rack where it belonged, and Bennett passed out. According to the testimony of Wiedenhafer, Jr. Kessler went out first, Parham following him; then Bennett, then Sullivan. Others place the order of going differently. Some of the witnesses who were there and who ought to have seen or known the order of things, did not see with sufficient distinctness, or did not remember clearly enough to state the order in which they went. John Wiedenhafer, junior who had come up there and taken hold of Parham and said to him there should be no more quarreling, and said when they went out he did not see any of them have a billiard cue. A man named Smith, an elderly man who was standing near the bar,

drinking a glass of beer with John Wiedenhafer, senior, and whose attention was called to the racket, says when they went out he saw one of the white men have a cue in his hand. Beyond that his observation is very indefinite and shadowy, except that he saw a ball fly across the room towards the rear end of the room where, it seems, Kessler was situated at the time. The parties then passed out, and this being about the situation of affairs, as the evidence discloses when they went out, the testimony diverges.

Kessler called as witness for the state, says that he and Parham were wrestling, and that Bennett followed them out and came up to him, Kessler, and struck at him; that Sullivan followed Bennett and was standing immediately at the head of some little stairs which they ascended as they came out of the saloon to go into the yard, and immediately after striking him, Kessler, Bennett started towards Sullivan who was still standing at the head of the stairs. There seemed to be a little scuffle between them, and immediately he saw Bennett turn and run past himself and Parham, and by a little building which had been used for a bottling house, around that being the road by which Bennett had come to the saloon and beyond that was the back alley so-called to the West house, servants quarters through which Bennett was accustomed to pass in going to the Sloane House; that immediately after Bennett passed, Parham ceased his struggle with him, Kessler, and started off and thereupon he, Kessler, started and went to Sullivan and found Sullivan standing at the top of the stairs shivering, and that he spoke to him and said, "Philly, I am stabbed," and thereupon he says he helped Sullivan into the saloon, and laid

him down upon the floor where he remained till he died. Sullivan could not talk after he spoke to Kessler.

Kessler says as Bennett passed him he saw that Bennett had a knife in his hand, saw the blade of it. I think he says it was a jack knife; at any rate he saw the blade of the knife. It will be seen from the testimony of Kessler that Bennett had *approached* Sullivan and had dealt him this deadly blow, and if that were all the testimony, the jury upon that testimony might well have found Bennett guilty of murder in the second degree.

But there are other witnesses who testify in regard to this matter and their testimony should be examined to see where the truth lies.

Frederick Ferderer, a witness called by the state, who was sitting in front of the saloon when the difficulty commenced, who is a man perhaps 70 years of age went back to the rear of the saloon and went up near the parties, spoke to some of them, taking the cue away from Bennett; John Wiedenhafer, senior, and Smith, before referred to both being witnesses called by the state, were standing at the bar sipping a glass of beer, and they both immediately started towards the rear of the room. Smith, having seen the parties pass out of the room returned to the sipping of his beer and saw nothing more, but John Wiedenhafer, senior, went on towards the back of the room and went to the window which overlooked this whole space of ground where Kessler says the parties were standing, or scuffling as also did Frederick Ferderer, and the two stood there looking out of the window. When they arrived at the window, the back yard was clear. They could not see either Sullivan and Bennett nor could they see Parham and Kessler. The testi-

mony of these witnesses, so far as it goes, tends to show Parham and Kessler in their struggles had passed around to the east of the door and behind some stairs that went up into an upper part of the building.

While they were there, Ferderer says, he opened the door and stepped out, and in a hollow between the windows he discovered a portion of a billiard cue, with about one-third of the top broken off, and he picked it up and brought it into the room. John Wiedenhafer, senior, about that time himself stepped out and stood there with a cane in his hand for the purpose of preventing any of these parties from returning into the saloon, and he remained there. Ferderer remained at the window near the door. Now, while Wiedenhafer was standing there, while Ferderer was looking out of the window, they both saw Sullivan come from behind this building I have spoken of, called the bottling works, which was west of the saloon door, across the back yard to the door of the saloon out of which parties had previously passed. The door was opened by Wiedenhafer, sr., and he opened the door for Sullivan to go in. Sullivan passed by him with his hand upon his side and immediately fell down upon the floor, and Wiedenhafer, senior, remained with him until he expired. Wiedenhafer, senior, and Ferderer both testify, and testified very clearly, the positions in which they were standing, and showing they were standing by the window or outside the door, but both standing in positions that commanded the whole of the space that was covered by Kessler's testimony, and covering all the space that lay between them and the entrance to the alley which was some few feet away west of the bottling house. They arrived at their positions very quick-

ly after these men went out, and were both on the watch, so is very clear upon the testimony of these two witnesses that Sullivan did not receive the wound from Bennett while standing at the place in which Kessler says he did stand. It was not while standing there that he was stabbed, nor was Kessler in sight of him when he was stabbed, according to the testimony of the above witnesses who have testified. According to testimony of Ferderer after Sullivan went back into the saloon Parham and Kessler swung around from behind the stairs into the front again and Parham seized some stones to throw at Kessler, and Ferderer said to Parham, "You must not throw them" and thereupon Parham dropped the stones and passed around into the alley and went away. There are some other things tending to discredit Kessler's testimony. He had testified at the hearing before the Coroner that he stood within an arm's length of Sullivan at the time he was stabbed by Bennett. He also there testifies that Bennett had a large bread knife with which he stabbed Sullivan, that it was "that long," indicating a space of about a foot. His testimony in the Common Pleas differed from that essentially, and it is perfectly clear upon the testimony for the state that Bennett was not armed with any such weapon; all he had was a large sized jack knife. Kessler also testifies that he had no cue out in the yard and that he took none with him when he passed out of the saloon.

There is a young man who testifies by the name of Frederick Butts, and he was also called by the State. Butts is a resident of this city, it seems he had resided here many years. He was employed in a confectionary store in the West block at the time of this stabbing. In pursuit of his

duties he was out at the back door of this store in the West block quite frequently, that afternoon. The door of the store opens back upon this space, and he could look over into the grounds in question, because this ground adjoins the West house, and could see what was going on. His testimony is not as clear and full and explicit as we would like to have it, but he does testify when he was there that he saw Kessler, whom he knew, standing with a colored boy in front of him, and Kessler had in his hands a billiard cue. He says he cannot tell for the moment whether they were struggling or scuffling but in the observation he made at the time he saw them he saw the cue distinctly, and knows who had it, so that it is very evident we think from his testimony he saw this very fracas and saw Kessler there with the cue in his hand.

We are forced to this conclusion in regard to Kessler's testimony, that so far as the final result of this affray is concerned, his testimony is of no value and ought to be left out of consideration, that the killing did not occur at the time or place and manner in which he states. We are then left with this state of facts, that these men had passed out of the saloon in the manner stated, that one or more of the white boys went out armed with cues. It appears from the testimony of the Coroner that he made an examination of Bennett's person the next morning and that Bennett had upon his back a mark, a large welt, that he appeared to be lame in his arm, and it was difficult for him to pull off his coat. It appears from the testimony of the officers who arrested Bennett that when they arrested him at the Sloane house, which was only a few minutes after the affray occurred, he

asked them why he was arrested, and the return question was "why did you stab that man?" He said he stabbed him or cut him because he had hold of him and would not let go. He also stated in addition that Sullivan had followed him and dealt him a blow with a cue, and it was for the purpose of ascertaining whether his statements were correct that the examination was made by the Coroner, at the time he found this mark or heavy welt.

The testimony of the defendant himself is that Sullivan followed him from the saloon, that he stated to go to the Sloane house by way of the alley and that as he turned the corner into the alley or about that point Sullivan who had followed him struck him with a cue across the back and followed it up by attempting to inflict another blow which Bennett dodged, but which grazed his face a little, which mark was there. So that the testimony of Bennet is corroborated by the Coroner's testimony, and we think the testimony shows that the statement of Bennett is substantially true, that he was followed by Sullivan, (for the testimony generally shows that Sullivan went out last) that Sullivan was armed with one of the cues, which probably he had in his hand in the saloon, that he followed Bennett out, that he struck him across the back with the cue, that he struck at him again, and that some conflict ensued between them during which Sullivan was stabbed. The testimony of Bennett is that Sullivan was following him up attempting to inflict these blows, until Sullivan got so close to him that he could not use the cue and then closed with him. He says the force of the blow Sullivan gave him was such as to partly turn him around so that he

was facing toward Sullivan and Sullivan grabbed him around the arms, holding his arms by his side, and was attempting to trip him, and that he got the knife from his pocket, opened it and delivered the blows.

Whether that be the correct statement of the affray or not, we think it must be held to be true in this case that Bennett was retreating, going from the place, passing from the saloon in the direct route he would ordinarily take going from the Sloane house, and was followed by Sullivan, who was keeping up this quarrel, and who was inflicting bodily injury upon Bennett, and it was during that struggle that the fatal blows were given.

Now, the question is, and the important question is whether that was murder in the second degree upon the facts of the case. The statute of the State now, by the revision, is changed in its phraseology but not in its meaning. It is section 6810:

"Whoever, purposely and maliciously, except as provided in the last two sections, kills another, is guilty of murder in the second degree, and shall be imprisoned in the penitentiary during life."

There is a distinction between the offences of murder in the first and second degrees in the State of Ohio from murder as it is described at common law. In the case of *Fouts against the State*, in the 8th Ohio State, the Supreme Court discusses that question, and they hold that under the statute of the State of Ohio, making murder a statutory crime, the intent to kill must be averred in the indictment, that is to say, that the act which caused the death was committed with intent to kill.

I think this question has been before

the Courts from time to time in this State, and I shall not attempt to give all the decisions, but I shall state one or two of them in regard to this matter. The question has been before the Supreme Court within a month, in the case of *Jones against the State* which was error to the Circuit Court of Brown County the Supreme Court held that "an intention to kill is an essential element in the crime of murder in this State and must be established beyond a reasonable doubt, to authorize a verdict of murder in the first or second degree. This rule is not changed by reason of the accused contending, and introducing evidence tending to prove, that the homicide was accidental. The legal effect of such evidence being, simply, to controvert an inference of an intent to kill, which may arise from the evidence introduced by the State."

See Law Bulletin, p. 299, May 28, 1894.

In that case a father had been put upon trial charged with killing his son while he was attempting to get him away from a house of ill repute, and it was claimed by the father that the killing was accidental. The Supreme Court held that an intention to kill is an essential element of the crime, and must be established beyond all reasonable doubt by the State to authorize a verdict of murder in the first or second degree. And that the rule was not changed by the defendant introducing evidence that the killing was accidental. Now, that is a burden that is cast upon the State. It must show the intent to kill and affirmatively. True, it may be shown by all the facts of the case, but the affirmative proof is upon the State to show by the evidence that there was at the time the blow was given an intent existing in the mind of the prisoner to kill the person whose life was taken.

It is argued here that the defendant in

this case was guilty of murder because he used a weapon that was dangerous, that to use it in the manner he did would necessarily tend to produce death in the person who was stabbed. That question is discussed by the Supreme Court in a case in the 29th Ohio State, *Baker vs the State*, p. 184, a case where a person is indicted for murder—shooting, and the Court had charged the jury "if you find from the evidence the defendant used a deadly weapon *in this case*, and that death resulted from the use of such deadly weapon, then the law raises the presumption of malice *in the defendant*, and also an intent *on his part* to kill the decedent."

The Court say:

"We can well see how the jury, under these instructions, may have been led to convict the defendant of murder in the second degree, though guilty of manslaughter only, or even though not guilty of any crime whatever. It was plainly inferable, from the first instruction above stated, that the defendant's crime was not manslaughter, if the killing were intentional. Such is not the law of manslaughter. If the killing be unlawful, but without malice as upon a sudden quarrel, although intentional, the crime is nevertheless manslaughter only. It is true that the jury must have found the presence of malice as well as purpose to kill; but having first found the purpose to kill, as we may suppose, they entered on the inquiry as to malice, under the influence of an instruction, that the defendant was guilty of murder or not guilty of any crime whatever; thus exposing the defendant to a moral influence against him, which should not have any lodgment in the minds of the jurors."

The Court further say:

"As an abstract proposition, where the

circumstances of a homicide are not known, further than the mere fact that the death was caused by the use of a deadly weapon, we do not deny that the jury may, from such fact alone, infer both malice and a purpose to kill. But where the attending circumstances are shown in detail, some of which tend to disprove the presence of malice or purpose to kill, it is misleading and erroneous to charge a jury that in such a case the law raises a presumption of malice and intent to kill from the insulated fact that death was caused by the use of a deadly weapon. In such a case the presence of malice or intent to kill must be determined from all the circumstances proven, including, of course, the character of the weapon. It may indeed be said, with much reason, the use of a deadly weapon in the taking of life raises the same presumptions whether other attending circumstances be shown or not; and that when other circumstances are shown, they either strengthen or rebut the presumption so arising from the character of the weapon.

The question before us, however, is not one of mere logic; but rather, how would jurors of ordinary understandings interpret and reason upon such a charge? The instruction was 'if you find from the evidence that the *defendant* used a deadly weapon *in this case*, and that death ensued from the use of such deadly weapon, then the *law* raises the presumption of malice *in the defendant*, and also an intent *on his part* to kill the decedent.' This was not an abstract proposition. It covered the case before the jury. And in our opinion a jury of ordinary intelligence might well understand that the law fixed the guilt of the defendant as a murderer, if the evidence showed that he took the life of the deceased by the use of a deadly

weapon, without regard to other circumstances; save only, as they were told in another part of the charge, that he might, under certain circumstances, justify on the ground of self defense. But our objection to the charge is independent of all question of self defense, and relates to it solely as bearing on the case which the State was bound to prove in order to entitle it to a conviction."

Upon the question whether the jury were justified from the facts and the law in the case in finding the prisoner guilty of murder in the second degree, the members of this Court do not arrive at the same conclusion.

Speaking for myself, and myself only. I think the verdict is clearly against the evidence, that is to say I think the jury were not warranted in finding the defendant guilty of murder in the second degree. I think the testimony shows, as I have already stated, that this young man was being pursued by Sullivan, that he was receiving bodily injury at the hands of Sullivan, and that during that affray Sullivan received the fatal wounds at the hands of the defendant. When Bennett was called upon in regard to this matter next day by the Coroner his first inquiry was "how is the young man that is hurt" and the Coroner said "he is dead." He said, "it can not be possible, I can not believe it." He says in his testimony that he delivered those blows for the purpose of making Sullivan let go of him. The statements that he makes, it seems to me, are entirely consistent with the facts of the case, and might well have existed. The burden of proof is upon the State to show from all the circumstances, clearly and beyond a reasonable doubt that there was a purpose in the mind of this young man to kill—a formed purpose

as much as though he said to himself "I strike you now, and I do it with the intention of killing you." I don't believe the facts show any such thought existing in the mind at that time. He was in a struggle, endeavoring to get clear, and used his knife during that fracas. It should be remembered that the decedent who was following him was using a billiard cue that was heavy. It is a formidable weapon, and one if the blow had taken effect upon Bennett his death would have laid the young man Sullivan himself open to indictment for manslaughter.

So that from all the evidence as it looks to me, there seems to be established this state of facts: That in an affray growing out of a sudden quarrel, a stab was given which caused the death of Sullivan. The Supreme Court say in the 29th Ohio State Supra that although that blow may have been delivered with intent to kill it does not make murder in the second degree. There must be something more; there must be shown malice in the heart of the party, that he not only delivered the blow with intent to kill, but did it maliciously, and with murderous purpose in his heart.

As has been suggested it may be that this young man had the knife in his hands and opened it before he says he did and Sullivan closed with him for the purpose of holding his arms down, so that he might not deliver the blow. That may have been the state of affairs, but I am unable to see how that would make any different result and from the law of the case, how it would change the act. I think it would still be a homicide during an affray, and would not only come within the definition of manslaughter, but within the general scope of decisions in regard to manslaughter in the State of Ohio.

My associates, however, while they have a feeling within their minds as I understand it that it would have been better for the jury to have returned a verdict for a lesser offense than they did, still on the whole facts of the case are unable to say the jury were not warranted in re-

turning a verdict of murder in the second degree.

We, however, all agree that the judgment of the Court should be reversed, and the verdict of the jury set aside, and the defendant should be awarded a new trial, and the Court so orders it, and that the costs be paid by the State of Ohio.

John P. Stein, Pros. Atty. for State.

S. A. Court, of counsel for the State.

King & Hull, counsel for the prisoner.

CHANGE OF GRADE.

Attorney Fees in Cases Where the City Refuses to Proceed.

The question of the right to recover attorney fees in proceedings for a change of grade, where the city refuses to proceed, was involved in a recent case before Probate Judge Millard. The action is entitled the *City of Toledo vs Michael Jacobson et al*, and the decision was upon a motion to retax costs, overruled July 31, 94. In thus disposing of the question the Court said:

Equitably, there is no question but what these attorney fees should be taxed against the city, and there is really more propriety in doing so in a change of grade case where the city refuses to proceed, than in an appropriation; from the very nature of the thing, we have got to have a different class of expert evidence. We have got to have men pass upon the buildings, the most of whom are experts in their particular lines, and are entitled to receive, and the rule of the Court has always been, greater compensation than is allowed simply to a witness in an appropriation proceeding, when he comes in to testify as to the value of the lands. But what troubles me here is the wording of this statute.

This section, 2260, says: "When a municipal corporation makes an appropriation of land for any purpose specified in this chapter, and fails to pay for or take possession of the same," then all these other things follow. Now, while the easement in a street is property, yet it is not land. It is an invisible something that goes with the land, but the land itself is not taken, and it is only the mode

of access to the land that is changed, and that mode of access is property. But it occurs to me that it is not a class of property that is covered by this opening sentence here, that "When a municipal corporation makes an appropriation of land for any purpose specified in this chapter." And with this sec. 2316, which provides that "If the Council decide to proceed therewith, an ordinance for the purpose shall be passed; and where provision as to damage is not made in this chapter, the provisions in chapter 3 of this division shall apply to the proceedings, so far as they are applicable."

The damage that is referred to in this section is not what expense the property-holder may be put to, I think, but it is the compensation, or method of compensation, for the thing taken; and while I have not seen any way that I could get around that, I am free to confess, that the Court is very much inclined to override the little omission of the Legislature to make the proper appropriation for this particular class of cases, and hold that the city should pay. It does seem to me, taking the statutes as they stand now, that the legislature has simply omitted in this 2316, at the time they were passing the amendment, to take into account the other class of proceedings, and make a provision for them.

MR. CUMMINGS:

My idea was that the legislature, in making that provision, had intended it to apply to all the proceedings for a change of grade; and where there was any omission, that the Court, for information as to what had to be done in these proceedings, should go to chapter 3 and be governed by that.

THE COURT:

If there is anything in chapter 3—

"When a municipal corporate makes an appropriation of land for any purpose specified in this chapter, and fails to pay for or take possession of the same within six months after the assessment of compensation shall have been made * * * upon motion of any defendant said costs shall thereupon be retaxed, and a rea-

sonable attorney's fee, to be paid to the attorney of such defendant, together with any other reasonable and proper expense incurred by defendant."

I cannot help but think that the legislature made a mistake, because the appropriation of land is so simple. This case is a most excellent illustration of the injustice of not allowing attorney's fees. Here were sundry parties employing expert workmen to estimate their damages and hired counsel. But as the law now stands, I can't see my way clear to allow the motion.

J. W. Cummings, for motion.

C. F. Watts, City Solicitor, against.

U. S. Circuit Court.

Northern District of Ohio--Western Division.

Filings.

G. H. Cole vs Oil Well Supply Co and John Eaton. Stipulation of dismissal and order discharging Recr. Entered as of July 18th.

1182—Farmers L. & T. Co. vs The T. A. A. & N. M. Ry Co. Amended and supplemental petition to original intervening petition of N. Y. Equipment Co. Clement Carpenter, atty.

1205—The Continental Trust Co. vs The T. St. L. & K. C. Ry Co. Receiver Callaway's report for July, 94. Receipts, including \$7837.28 cash on hand July 1, were \$194,590.87. Disbursements—Current, \$184,156.55; other claims, \$842.89. Cash on hand, \$1591.43.

1177—The N. W. Mnt Life Ins. Co vs John S. Greenler et al. Appraisal of s ½ n w ¼ and all s w ¼ sec 12 t 3 N R 6 e; also s ½ n w ¼ sec 13 t 3 N R 6 e. Defiance Co. Appraised at \$13533.33.

1232—The Carter Crume Co. vs The Oval Wood Dish Co. Bill for accounting, alleging infringement of patent, and for injunction. Stem & Allen, Cincinnati, Sols for Complt.

U. S. District Court.

In Admiralty.

Abraham Gilmore et al vs Str Mineral State. Libel for dockage, supplies and repairs. R. R. Kinkade, Proctor.

178—F. Scott et al vs Mineral State. Int Libel for seamen's wages, \$15.50, F. W. Rickenbaugh, Proctor.

178—Wm. Bonnah vs Same. Int libel for seaman's wages, \$165. F. W. Rickenbaugh, Protor.

Toledo Legal News.

OFFICIAL LAW JOURNAL OF LUCAS
COUNTY, OHIO.

In the matter of the designation of a daily Law Journal in Lucas County. As required by Sec. 1 of an Act passed April 14th, 1884 and amended Feb'y 25, 1886, entitled "An Act relating to the posting of court calendars and legal notices in certain counties," as amended May 9, 1884, the Judges of the Courts of Record in said County other than the Circuit Court, hereby jointly designate the TOLEDO LEGAL NEWS, a daily law journal published in said County, as the journal wherein until the further order of said Judges, shall be published all the notices, advertisements, abstracts and matters and things specified or referred to in said Section 1.

Approved {
GILBERT HARMON,
RICHEN C. LEMMON,
ISAAC P. PUGSLEY,
Judges of Common Pleas.
I. I. MILLARD, Probate Judge.

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SATURDAY, AUG 25, 1894.

RECENT CASES.

Electric railways in Toledo promise more interesting litigation, undoubtedly on its way to the Supreme Court. The latest legal complication grows out of the operation of cars of the Toledo and Maumee Valley Railway Co. over lines owned, originally at least, by the Consolidated in Toledo. Certain portions of these lines were condemned by the Toledo Electric St. Ry. Co., whereby the latter company acquired the use of tracks and sub-structures belonging to the Consolidated Company. After the new company completed its line to Perrysburgh it was allowed to enter the city, under contract with the Consolidated, over the lines owned and used by that company and the Toledo Electric St. Ry. Co., by virtue of condemnation proceedings referred to. The latter company now brings suit, praying for an injunction, claiming that it acquired, by condemnation, not only the right to use tracks and sub-structures of the Consolidated, but acquired an equal ownership and right of maintenance therein, which should not be subjected to the use of the new company without compensation to it, The Toledo Electric St. Ry. Co., as well as the original owner, the

Consolidated. The application for an injunction will be argued and submitted to Judge Harmon within a few days.

Chas., Hannibal Frank and Ellen Hamlin, heirs of Hannibal Hamlin, have applied to the United States Circuit Court in Toledo for leave to intervene in the Consolidated cause of the Continental Trust Co. vs. T., St. L. & K. C. Ry. Co., a foreclosure proceeding representing a majority of the various claims against the Clover Leaf road. The Hamlins ask to be admitted for the purpose of establishing a second lien, in the form of coupon preferred stock, to the amount of \$5,500,000. The bonded indebtedness of the Clover Leaf is said to be about \$30,000 per mile. This does not appear to be a trifling sum but is said to be much less than that of the Wabash and other roads.

An opinion was delivered by Judge Smith, Hamilton County Circuit Court, Aug. 7th, (Court Index Aug. 10th, '94,) holding that to pass weak alcohol through roasted malt in the process of making vinegar does not fall within the inhibition of 85 Ohio Laws, page 216. This view, however, is in a dissenting opinion, the judgment of the lower Courts holding the reverse to be true, being affirmed.

The Court of Common Pleas of Pittsburgh (Stowe, P. J.) recently held that derricks, engines and boiler houses, used in the business of drilling for oil, are not real estate and that they do not fall either within the list of personal property subject to taxation for road or school purposes. (Pittsburgh L. J., Aug 8-94.)

Hon. Samuel F. Hunt, of Cincinnati, presided at the meeting of the American Bar Association, held at Saratoga Springs this week, and read the address of Hon. Thos. M. Cooley, president, who was absent on account of illness.

Among the decisions reported in the June 20th number, 23 L. R. A., we observe the following adjudications:

U. S. C. C. of Appeals—5th Circuit. Insanity resulting from the shock and excitement caused by a railroad accident to a passenger who sustained no bodily injury will not make a railroad company liable.

Nebraska Supreme Court. Upon the dissolution of a partnership by the death of one of its members, the surviving partners may carry on the same line of business at the same place as was transacted the firm business without liability to account to the legal representative of the

deceased partner for the good will of said firm, in the absence of their own agreement to the contrary.

Arkansas Supreme Court. One convicted of a capital offense and sentenced to death in one state is not thereby prevented from maintaining a civil action in another state.

Wisconsin Supreme Court. The docket entry of a judgment against Edward Davis is not constructive notice that there is an incumbrance against either E. A. Davis or Edward A. Davis and does not affect the rights of a person who has no notice of the actual identity of Edward Davis and the judgment debtor

U. S. Circuit Court.

Northern District of Ohio--Western Division.

Filings.

1205—Continental Trust Co. vs The T St L & K C Ry Co. et al. Petition of Chas. H. E., Frank and Ellen V. Hamlin for leave to intervene and set up second best lien on Clover Leaf Road. Doyle, Scott & Lewis, attys.

For hearing at Cleveland August 31st at 10 a m.

1094—Herbrand vs Merrill. Stipulation that cost of printing testimony may be taxed in favor of the successful party. W. E. Dyre and Wood & Boyd, solrs.

394—The Central Trust Co. vs Ohio Central R R Co. Order for service. Doyle, Scott & Lewis, solrs.

U. S. District Court.

178—Seely vs Schooner Mineral State. Intervening libel by Master for advances to pay charges and liens, \$146.31. John M. Ormond and John R. Calder, proctors.

179—Dunford and Alverson vs Prop. Michael Graw. Libel of Sarah E. Dunford, \$527.44, and Thos A. Alverson. Colver & Colver, proctors.

The Toledo Legal News,
\$3.00 PER YEAR,

In Advance.

PROSECUTING ATTORNEYS.

Removal for Neglect of Duty or Official Misconduct.

(Sixth Judicial Circuit, Erie County. May Term, 1894. Present, Hon. C. S. Bentley, P. J.; C. H. Scribner and G. R. Haynes, J. J.)

In the matter of the complaint of Gustavus Graham et al against John P. Stein, Prosecuting Attorney. Petition in Error.

(1—It is not necessary that a complaint under Section 1272, R. S., relating to neglect of duty or misconduct in office of Prosecuting Attorneys, should be verified by oath.

2—In a proceeding to remove a person acting as Prosecuting Attorney, it being urged that there being no evidence adduced upon the trial that the complainants were taxpayers, the Court was without jurisdiction to enter the judgment of removal, HELD, that the matters to which evidence is to be addressed on the trial are the issues in the case. The issues of fact to be tried on the hearing arise from the assumed denials of the truth of the charges made, and the issues of law as to the sufficiency of the charges in form and substance, and not whether there is any complaint at all, by proper persons, unless that issue is actually raised by the Prosecuting Attorney or is presented by the record on its face.

3—To warrant removal under sec. 1272, R. S., there must be official misconduct; mere MISCONDUCT WHILE IN OFFICE is not sufficient.

4—The Prosecuting Attorney is the legal adviser of County Officers and in voluntarily placing himself in a position either to be obliged to refuse to give such officials advice, or to give advice hampered by a contract with a third person adverse to the interests of the county, is official misconduct.

5—An agreement made with a taxpayer by a Prosecuting Attorney who is also acting, under contract with the County Commissioners, as Tax Inquisitor, that he will not investigate such taxpayer as to his taxes prior to a certain date, where the time referred to in the agreement is within the time specified by the statute for investigation, constitutes official misconduct as Prosecuting Attorney.

6—It is the duty of a Prosecuting Attorney who, being employed by the County Commissioners, collects funds belonging to the county, to deposit the same in the County Treasury at once. He is presumed to know the specific direction of the statute in this regard and a failure to comply with it is official misconduct. The fact that another attorney might have been employed to make the collection does not relieve the Prosecuting Attorney from official responsibility.

7—It is not necessary, in the removal of a Prosecuting Attorney for official misconduct, that he should first, or at any time, be indicted, tried and convicted criminally of the offense or offenses charged against him.—ED. LEGAL NEWS.)

BENTLEY, J. (Orally.)

This is a petition in error presented by the Prosecuting Attorney of this County, to reverse the order and judgment of the Court of Common Pleas of this County removing him from office.

It is an unusual case and we have given

it careful and considerate thought. And it would be our pleasure no less than our duty to reverse the judgment if we should find upon applying the rules governing the action of reviewing courts, that the charges are insufficient in form or substance or are not sustained by sufficient evidence, or that the manifest weight and effect of the evidence is opposed to the conclusions of the Court. It is recognized that a single charge properly made and properly sustained by the evidence would warrant the final judgment of removal, and to reverse the judgment it will be necessary to find that there is no proper charge at all, or if there was such a one, that it is not sufficiently sustained by evidence.

We suppose we may dismiss from consideration all the specifications of the complaint, as to any action of the court therein, except the 1st, 3rd, 9th and 11th, specifications, since all the others are by the final judgment dismissed.

The complaint, omitting the specifications which were finally dismissed (except the 10th, to which the 11th refers) reads as follows:

"To the Court of Common Pleas of Erie County, Ohio: The undersigned residents, citizens and tax-payers of the County of Erie, come and complain to the said Court of one John P. Stein, Prosecuting Attorney in, and for said County of Erie and State of Ohio, and do charge the said John P. Stein with gross misconduct in office, and as specifications thereof, state the following:

"SPECIFICATION NUMBER 1.

"That the said John P. Stein while holding said office on or about the 27th day of January, 1892, did engage his services as attorney at law and as Prosecuting attorney to and with L. L. Stoddard,

Mary A. Lockwood and R. M. Lockwood, executors of the estate of J. C. Lockwood, to influence and procure the Auditor of said county to erase or take from the tax list and duplicate of said county a sum of \$11,000 or more of taxes that had been added to said duplicate by the said Auditor as omitted taxes upon property belonging to the estate of J. C. Lockwood, deceased, and did influence and procure the Auditor to take and erase the said amount from the said tax duplicate and said John P. Stein did for his services in that respect charge and demand, collect and receive of the executors of said estate the sum of \$100, and the sum so erased and taken from said tax duplicate was all that had been added as omitted taxes, save and except the sum of \$408.45 and having secured this property to be taken from the tax duplicate, in violation of his duties as Prosecuting Attorney, and having received said fee of \$100 for performing said services, in violation of his duties as Prosecuting Attorney, he, within six days thereafter, or by February 2, 1892, secured the appointment as Tax Inquisitor and entered into a contract with the Commissioners, Auditor and Treasurer of said county, under the statute in that case made and provided, and on or about June 18, 1893, made his bill for the sum of \$40.84, being 10 per cent commission for collecting the said sum of \$408.45, and presented the same to the Commissioners and secured their allowance of the same as and for commission that was due him as such tax inquisitor under his said contract, which contract provides that he is to have 10 per cent upon the amount of taxes collected.

"SPECIFICATION NUMBER 3.

"In this, that the said John P. Stein presented to the County Commissioners

his bill, on or about the 3rd day of May, 1892, and received an order therefor, and drew from the County Treasury at the above named date, the sum of \$144.15. And on or about the 29th day of July, 1892, made out his bill, and presented it to the County Commissioners, which was allowed, and drew from the County Treasury on that day, \$368.28, the two said items being as he alleged, a 10 per cent commission as Tax Inquisitor under his contract for putting upon the tax duplicate property upon which taxes were collected to the amount of \$4,124.11 which had been omitted by the Lake Shore & Michigan Southern Railway Company, whereas the said property had not been omitted by the said Lake Shore & Michigan Southern Railway Company, whereas the property of the Lake Shore & Michigan Southern Railway Company, is appraised and put upon the duplicate by a committee of Auditors of the several counties through which the said railroad passes, and in placing the property of the said Lake Shore & Michigan Southern Railway Company upon the tax duplicate of Erie County, an error was made by the Auditor of said county himself, in making the proper distribution of the tax among the different funds, so far as the village of Huron in said county was concerned. And the said error was not an omitted tax at all, and the said county did not owe the said John P. Stein the said 10 per cent, or \$412.41, nor any part thereof.

"SPECIFICATION NUMBER 9.

"In this, that on or about the — day of May, 1893, he collected as Prosecuting Attorney of said county from one N. F. Goosman the sum of \$64.73, claiming that the same was due to the county of Erie for clothing furnished the wife of

the said Goosman, who was an inmate of a State institution, and which sum of \$64.73 was collected by the said John P. Stein, as aforesaid, which the said John P. Stein appropriated and converted to his own use and did not account therefor."

Specification number 10, though dismissed itself, it is necessary to consider in order to consider number 11, which alludes to it.

"SPECIFICATION NUMBER 10.

"In this, that on or about the — day of April, 1892, the said John P. Stein pretending to be a Tax Inquisitor, under and by virtue of a contract herein before referred to, made a claim against one Samuel Devlin, a citizen of Erie county, that he, the said Devlin had omitted to return all of his property for taxation during the years prior to April 1st, 1892, and the said Samuel Devlin paid to the said John P. Stein as such Tax Inquisitor and Prosecuting Attorney as aforesaid, received the sum of \$20 from the said Samuel Devlin for the purpose and upon the agreement between them that the said John P. Stein should not investigate the said Samuel Devlin, nor inquire whether he had omitted to return his property for taxation, for some or all of the time prior to the 1st day of April, 1892, and should make no claim against the said Samuel Devlin for said omitted property or taxes therefor.

"SPECIFICATION NUMBER 11.

"In this, that on or about the 27th day of April, 1892, the said John P. Stein, then Prosecuting Attorney of Erie County, Ohio, and also then having the said contract as aforesaid, made a still further contract with the said Samuel Devlin hereinbefore referred to, he, the said John P. Stein, having learned that his

proceedings and his agreement stated in Specification number 10 had been public, or known to those other than the parties thereto, made another contract with the said Samuel Devlin, to-wit: That the said Samuel Devlin having paid him the sum hereinbefore mentioned by a check, which check had not been presented and collected by the said John P. Stein, he, the said John P. Stein, agreed to and did surrender to the said Devlin the said check aforesaid and he, the said Samuel Devlin, did agree to and with the said John P. Stein that he would destroy the said check aforesaid, and also destroy the receipt which the said John P. Stein had given to the said Samuel Devlin on the day of the date of the said check; and the said John P. Stein did then and there also agree to and with the said Samuel Devlin, that in consideration that the said Samuel Devlin should destroy the said check so returned to him, and the said receipt which he had so received from the said John P. Stein, he, the said John P. Stein, would not investigate the said Samuel Devlin as to the property of his which he had omitted to return for taxation, prior to the first day of April, 1892, although the contract under which he had been engaged as such Tax Inquisitor, and the statutes under which he acted, authorized and required of him to investigate for a period of five years next preceding the year in which such investigation was made.

"The undersigned therefore ask that the conduct of the said John P. Stein be investigated, and such order or judgment be rendered as the facts in the case will warrant."

It is signed with the names of eight persons. It was filed in the Court of Common Pleas April 7th, 1894, and it was

under this complaint thus filed that the proceedings were had which resulted in the judgment now asked to be reversed.

A primal objection to this complaint which has been urged with spirit and force by counsel for the plaintiff in error, is that it is not verified by oath. The statute under which this proceeding was instituted is Section 1272 and reads as follows:

"On complaint in writing, signed by one or more taxpayers, filed in the Court of Common Pleas, containing distinct charges and specifications of wanton and willful neglect of duty, or gross misconduct in office, by the Prosecuting Attorney, the Court shall set down the complaint for hearing and cause reasonable notice thereof to be given to the Prosecuting Attorney of the time so fixed by the Court for the hearing; and at the time so fixed, or at such time as the Court adjourns the hearing to, the Court shall hear the evidence adduced by the complainants and the Prosecuting Attorney; and if it appears that the Prosecuting Attorney has willfully and wantonly neglected to perform his duties, or has been guilty of gross misconduct in office, the Court shall remove him from office and declare the office vacant; but otherwise the complaint shall be dismissed; and the Court shall render judgment against the losing party for costs."

The statute does not specify that the complaint shall be sworn to and we do not think it should be so constructed as to require it. It does not provide for a criminal prosecution and it can well be assumed that as the complaint is to be made by taxpayers, and if not sustained the complainants are liable for costs, the Legislature did not deem it necessary to provide the further sanction of an oath.

The filing of the complaint is not to be followed by an arrest or any interference with the liberty or property of the Prosecuting Attorney prior to a full hearing and judgment, so that the reasons which have impelled the Supreme Court to hold that criminal prosecutions should rest upon some initial oath, do not bear in such a case as this.

It is also argued that, as there is no evidence upon the trial that the complainants were taxpayers, the Court was without jurisdiction to enter the judgment of removal. The matters to which evidence is to be addressed on the trial are the *issues* in the case. The *issues* of fact to be tried on the hearing arise from the assumed denials of the truth of the charges as made, and the *issues* of law are as to the sufficiency of the charges in form and substance, and not whether there is any complaint at all, by proper persons, unless that issue is actually raised by the Prosecuting Attorney or is presented by the record on its face. The Prosecuting Attorney presented no such plea by the filing of any motion or otherwise, and offered no proof to overthrow the presumption of jurisdiction afforded by the face of the proceedings.

Furthermore, Section 1272 provides for a notice to the Prosecuting Attorney only when there is filed "a complaint in writing signed by one or more taxpayers." By the filing of such complaint jurisdiction to proceed is given, and the certified transcript of the journal entry in this case shows this, under date of the 7th, day of April, 1894:

"This day came G. A. Graham others, citizens of said county, and taxpayers therein, and filed a complaint in writing in this Court against John P. Stein, Prosecuting Attorney, and it is thereupon or,

dered that said complaint be set down for hearing on Monday the 23rd, day of April, A. D. 1894, at 9 o'clock A. M., and the clerk is ordered to make a copy of said complaint with this entry and serve on said John P. Stein at least ten days before said April 23rd, 1894."

We must presume from this recitation of the action of the Court that it had sufficient evidence of its own jurisdiction to order the notice and to set the case down for hearing as it did. And this presumption is sufficient till it is made affirmatively to appear that it is not, or was not, well founded. We must therefore hold adversely to the plaintiff in error on this claim.

As to the sufficiency of the four specifications upon which the final judgment is based, it is claimed that all except the 9th, is based upon alleged misconduct of the plaintiff in error, not in his office of Prosecuting Attorney, but in his office or character as Tax Inquisitor. Certainly to warrant removal under this section there must be "misconduct in office," that is to say, official misconduct, and mere misconduct *while in office* would not be sufficient. The misconduct must be as regards matters as to which the incumbent of the office owed a duty as such officer, and a violation of propriety as to any matter regarding his Tax Inquisitorship would not be ground for his removal from the office of Prosecuting Attorney unless it was a matter that also involved his conduct as Prosecuting Attorney.

So the question is presented whether number 1 of these four charges did involve his conduct as Prosecuting Attorney. It is not my purpose to discuss them at any great length, or to cite authorities, but simply to briefly indicate our views regarding it.

The first specification we may say gen-

erally regards the Lockwood case. This is, in January and before Mr. Stein was appointed Tax Inquisitor and while he was Prosecuting Attorney, he made an agreement upon a consideration with the representatives of the Lockwood estate touching some property assessed for taxation upon the tax duplicate, or at least upon a book called the Book of Additions, which for the purpose of taxation is regarded as part of the duplicate. There was a large amount of property placed there, and, as the Lockwood representatives claimed improperly and illegally. It had been placed there by the Auditor and it would appear that the action had been taken possibly upon consideration of certain evidence produced to the Auditor by one Cole, who represented Morgenthaler Brothers, who at that time had a contract with the county as Tax Inquisitors. In general terms the substance of the agreement was that, although he was then Prosecuting Attorney, Mr. Stein, under these circumstances, would endeavor to induce the Auditor to take from the tax duplicate this property so assessed against the Lockwood estate. He agreed he would do that for \$100. They agreed to pay the \$100 and when the action was accomplished they did pay him the \$100.

Now the question is presented whether the Court of Common Pleas under such circumstances as that had any authority to find that that action constituted gross misconduct in office as Prosecuting Attorney. I need not recite and will not recite the elaborate opinion of the Court of Common Pleas treating of this matter, but will simply, and briefly and in a very general way call attention to the situation as it would strike any lawyer.

We must judge of the claim made in behalf of the Prosecuting Attorney in this

regard in view of the various statutes that bear upon his duties, because misconduct must be that he failed to comply with some duty which rested upon him, as Prosecuting Attorney. The general nature of his duties is provided in section 1274, although a great many other sections also prescribe certain duties that he is to perform. Section 1274 is brief and reads as follows:

"The Prosecuting Attorney shall be the legal adviser of the County Commissioners and other county officers, and any of them may require of him written opinions or instructions in any matters connected with their official duties; and for these services the County Commissioners shall, annually, at their December session, make him such allowance as they think proper; but this section shall not apply to any county having a County Solicitor."

This is not one of the counties where by law a County Solicitor may be appointed. It has no County Solicitor and cannot have. This section then, plainly and unequivocally makes the Prosecuting Attorney, as such, the attorney or legal adviser of all the county officers, including the commissioners, who have general control of the county officers, and the County Auditor. Certainly the County Auditor is one of the county officers meant and intended by this section. The County Auditor then in the discharge of his duties had the right at any time not only to consult the Prosecuting Attorney, as such, orally, but to require a written opinion upon any matter touching the Auditor's duties.

Now here is a grave matter presented to the Auditor's consideration. Here is a large amount of taxes which stand upon the duplicate or in process of collection, and the question is whether they shall be

stricken from the books of the county so that there will be no authority of the Treasurer to collect them. It is claimed that it was certain that this ought to be done, that really there was not very much question about it in fact, and that the representatives of the Lockwood estate were correct in their claim. However that may be, whether they were correct or not, the County Auditor had a decision to make whether or not he would comply with that request.

There is a question made whether he would have the right in any way by any person's advice himself to strike from the duplicate or this Book of Additions any property whatever. However that may be, an occasion was presented that required a decision at his hands whether he would so act or not. Now in behalf of the Prosecuting Attorney it is claimed that inasmuch as by a contract with the Commissioners there had been a Tax Inquisitor appointed, he had become as to those special tax matters the legal adviser of the County Auditor, and that the Prosecuting Attorney was relieved from any liability or duty regarding that matter, and that therefore he was perfectly free to take a retainer as to that particular matter against the County Auditor.

It would be seen that the Prosecuting Attorney having taken this retainer, if he complied with the contract that he had made with his client, was in no fit condition whatever to act as the legal adviser of the County Auditor. Under such circumstances it would be but the veriest farce, of course, for the Auditor to seek the advice of the Prosecuting Attorney, already under a contract for \$100 to persuade the Auditor to do a certain thing. And so the question narrows down as to this particular matter, whether or not, as

a legal proposition upon the facts as they were claimed and stated and proved, the Prosecuting Attorney's claim that the law had itself provided a legal adviser for the County Auditor and relieved the Prosecuting Attorney of any duty to give him any advice in this matter is right. I will not take the time to read the section which provides for the appointment of these tax inquisitors, but it will be seen upon reading it that it does not provide that the person so appointed shall be an attorney at all, or have any knowledge of the law, or be in any wise fitted for the legal adviser of anybody. It may be a business man, it may be any person with whom the County Commissioners and the other county officers see fit to contract. So that as the law does not provide that he must necessarily be an attorney who is appointed tax inquisitor, the mere incident, the mere accident, so to speak, that in any particular case a lawyer has been appointed, does not throw any light upon the resolution of this question.

It is said, and we happen to personally know, that Mr. Cole was in fact a lawyer. He was the agent of Morganthaler, and I do not know but there is some suggestion that Morganthaler himself is a lawyer, but, however that may be as to either of these persons, if either of them was a lawyer it was a mere accident. But now supposing the law even required that the tax inquisitor to be appointed should be a lawyer. What were his duties under the statute. Did he become the legal adviser of the County Auditor? Not at all. Such a duty was not imposed upon him neither by the provisions of the law nor by the provisions of the contracts that are generally made in cases of this kind. He is a mere assistant of the Auditor to hunt up testimony, to present evidence to the Auditor upon which the Auditor is to act

or refuse to act. It is, after all, the Auditor who is to act upon the evidence presented by the Tax Inquisitor or the information that he may acquire in any other way. He is the final arbiter and actor in the matter. When the Tax Inquisitor has done all that the law requires or allows him to do, or that his contract requires him to do, he has simply presented to the Auditor the necessity of making a decision as to what he shall do in the particular matter presented. So that in the ordinary course of matters if the Tax Inquisitor has zeal and activity, as he is apt to have, not only is the Prosecuting Attorney not relieved from the liability to advise the Auditor, but the occasions where his advice would be needed are indefinitely multiplied and made even more important than ordinarily they would be.

Now supposing after the Tax Inquisitor had presented whatever evidence he had presented in this matter, if he had presented any, the Auditor was in doubt how to act and he turned to his legal adviser, to whom would he go? Why to the Prosecuting Attorney, by the plain provisions of Section 1274, and now when he should apply to Mr. Stein for advice as to what he should do in the matter, in what position had Mr. Stein placed himself regarding giving him advice?

There were only two ways presented for him to act. One was to say to the Auditor frankly, "I have entered into such obligations as will preclude me from giving you such advice as you are entitled to have," or else, notwithstanding his contract with his client to attempt or assume to give the Auditor advice. If he had attempted to advise the Auditor under circumstances of that kind as the Prosecuting Attorney, having that retainer in his

pocket, or the promise of it, we need not but state the situation to show that such a course of conduct would be reprehensible in the view of every person. The only thing that would be left to him at all to do would be to frankly state to the Auditor that he had in fact accepted a retainer which forbade him giving the advice which he sought.

And now how would that place him? The law had plainly devolved upon him the duty of advising the County Auditor. It was his duty, it was his official duty to do that, he must do it if he performed the duties of his office. He was paid a salary as it appears in this particular case of \$400 a year for that and the other duties which he was to perform under this Section 1274. So that at the very best he had placed himself in such circumstances that he must say to the Auditor, "I cannot perform the legal duties devolved upon me by the statute; I cannot be your legal adviser." Now if it happened that, by any fortuitous circumstance over which he had no control, he had been placed in a position so that he could not give legal advice to the County Auditor, that would be one thing, but whatever may be said of his want of forethought in this matter, and of his acting with no actual thought of impropriety, yet there was and must be the presumption all the while of his having knowledge, especially in view of the fact that he was Prosecuting Attorney, that here was the plain direction of the statute touching his duties as the legal adviser of the County Auditor and that it would forbid him to thus place himself in a position where it would be impossible for him to advise the County Auditor. He had in fact made just such a voluntary contract upon the consideration mentioned. Doubtless a great deal might be said

even when judging of this transaction, by way of excuse or palliation and that these facts might exist and yet not affect the actual manhood of the man in the spring of his intentions and motives, but, at the same time, here are the elements that go into a legal judgment. Here are the facts, here is a knowledge of these facts, here is the law to be applied to them; and the legal conclusion would seem to be inescapable that in thus voluntarily placing himself in such a position either to be obliged to refuse to give advice, or to give advice hampered by this contract, he had been guilty of official misconduct. Not as Tax Inquisitor. We do not regard this proof or this allegation to be so much against him because afterwards as Tax Inquisitor he collected 10 per cent. upon some amount that was still left upon the duplicate, but because the situation is presented that I have here detailed.

The Court of Common Pleas found that that was misconduct in office, that it was charged and that it was proven and there is no question about the proof; so now to reverse this judgment is to simply say in the syllabus of a case as the general law of the land, after reciting the facts and circumstances which I have here detailed, "Held, that it did not constitute misconduct in office of the Prosecuting Attorney." I think there would be few lawyers who upon a careful consideration of these circumstances would be willing to put their names to a brief containing a paragraph stating that proposition of law.

And if this is so, if this reasoning is correct, if this conclusion is correct, it matters not whether the action of the Court of Common Pleas upon the other three specifications is correct or not. The judgment must have been for Mr. Stein's removal from office.

But I will say as to this railroad matter,

the third specification which was stated, I will say frankly for myself, and I think I speak the idea of my associates, I am certain I do, that if it stood upon that alone we would hesitate long before we would act upon that; not but that it seems to be clear when it is studied carefully that Mr. Stein was not entitled to regard this as an addition of property upon which he was entitled to something as Tax Inquisitor, yet it was presented in such a peculiar form, that, considering the services he was called upon to render and the peculiar nature of the mistake, it might well be that in the hurry of forming conclusions he might honestly regard that as being something he was entitled to. Here is a case where the conclusion is to be drawn from the facts. The law is not so clear and explicit that it can be said that the Prosecutor must be presumed to have had the impropriety in his mind when he took the fee, and there is another question in that matter, too, whether or not he was acting as Prosecuting Attorney sufficiently to sustain this specification of the charge. Possibly he was; probably he was, and probably it might be clearly shown that he was so acting, or at least that it involved his conduct also as Prosecuting Attorney when we take a broad view of all his relations to the county, the tax duplicate and the County Auditor.

As to the Goosman matter it is said that it does not present the facts which would warrant a removal from office. The fact was the county had claims against several individuals and had asked the Prosecuting Attorney to take charge of them and collect them. He took this matter and succeeded in collecting quite a little sum, some \$65., I believe, and he attempted to collect some of the other matters handed

him at the same time,—separate and distinct bills against the other parties, and finally he did not succeed in making any other collection and there was some question as to whether he should actually begin suit against the parties. He had asked the Commissioners their advice in the matter, and was rather waiting for awhile to see what they would say, but they did not make any reply directly, and the other bills were laid aside and finally the matter drifted along and nothing further was done about it. But he took the money and deposited it in a bank to his own credit with his other money,—to his private account—and kept it pretty nearly a year. He made no account of it upon the book which the law required him to keep and which if he had kept, his attention would necessarily have been called to this item and his duty to deposit it in the County Treasury. He made a memorandum of it in his private note book, and it rather escaped his mind and memory for quite a time, until he happened to be looking for something in the book and found the memorandum. Just when that was does not appear to be very clear, but at least he kept it for nearly a year before he turned it into the treasury. After he had learned the committee were investigating this matter and had discovered this matter, and in fact somebody was indicating something in the nature of a threat of some prosecution, as he himself says a threat that he would have him prosecuted for it criminally, have him sent to the penitentiary for it, he still, under the advice of some of his friends, as he says, kept it from the county treasury until after the committee had made their report and he then deposited it with the County Treasurer and took his receipt.

Well, a considerate, humane considera-

tion of this matter might lead one to exculpate him on account of his lack of memory in the matter. It might have drifted beyond his memory at the time, so that, really, there was no intention finally to defraud the county out of it, but he himself does not like to put it wholly on the ground of a want of memory but rather upon the claim or idea that under the circumstances that I have detailed, there being some other claims against other persons handed to him at the same time, he would have the right to retain this money until he had settled up the whole business and then deposit everything together no matter how long it might take. An idea of that kind, of course, is a delusion, and the trouble of it is, it is a direct violation of the specific terms of the statute. And, too, he knew the facts, he knew he had the money; he knew he had not deposited it in the treasury; he must be presumed to have known the specific direction of the statute that he should at once deposit it, and he did not do it. Therefore it cannot be said that the transaction was correct, that it was legal, and if it was not proper and legal conduct, then it was *misconduct*, and if it was misconduct, if it was gross, it came under the terms of the statute. Well, there is no lawyer that would like to see put in a syllabus, that a Prosecuting Attorney having collected money, no matter how much—whether \$65, or \$10,000 would make no difference in the principle,—having collected at the instance of the County Commissioners money belonging to the county and retained it for nearly a year, making no account of it in any book except a private memorandum book, never reporting it nor specifying it in any report that he did make, and then depositing it at a time when threats were made, that notwithstanding

all that, "*Held*, that such conduct was not misconduct in office." That certainly would be misconduct in office unless it can be said that this was a matter in which he was not acting as Prosecuting Attorney, but that he was acting in a matter such as any attorney might attend to for the commissioners. It is perhaps true that the County Commissioners might have employed a collector and not a lawyer; they might have employed another lawyer to make these collections, but they did not do it. He was the legal adviser of the County Commissioners and of the county generally, and he was the general legal guardian of its interests, and if he was the legal adviser of the county he was the attorney of the county, and when he had collected money, although the collection might have been intrusted to another, yet if it was intrusted to him and he did collect it, and it was in his pocket, it was the money of the county in the pocket of the Prosecuting Attorney, collected by him.

Under these circumstances, whatever may have been the capacity in which he was acting in collecting it, when it got into his possession it was the money of the county and he had it, and he was the Prosecuting Attorney and the legal adviser of the county and its attorney. He was certainly holding that in his character as Prosecuting Attorney; that is, it was his legal duty as Prosecuting Attorney to have turned it into the treasury. I remember a case in Michigan, though not exactly parallel, yet the principle would seem to be analogous, where a County Treasurer was prosecuted for certain taxes that he had collected, and it was shown that the taxes were paid before they were legally payable, that the County Treasurer could not have enforced the collection of the taxes at the time they were volun-

tarily paid to him, and the claim in his behalf was made that, therefore, having received the money at a time when he could not, as Treasurer, have enforced their collection, he did not receive it as County Treasurer, and was not therefore liable as such for it and that his bondsmen were not liable; yet the Court in that case held that although it was paid under such circumstances that he could not have enforced its collection and no law provided it should be paid at the time, yet that when it was in fact paid, it was the money of the county and he as a county officer and his bondsmen were liable for it. At any rate, as to this particular specification, we would not be willing to say that, granting these facts, the Court of Common Pleas was manifestly in error in holding that it justified the order it made.

Now as to the Devlin matter,—the 11th, specification. It seems that the Court of Common Pleas did not find that the original matter with Mr. Devlin was such as it ought to find was misconduct in the Prosecuting Attorney. That is, he allowed the force of the testimony to indicate the conclusion that the transaction was substantially as Mr. Stein claimed it to be, and held in his favor as to the tenth. But on the 11th the facts were undisputed, and were testified to by the Prosecutor himself, that is that upon a sufficient consideration, he had entered into a written contract with a tax-payer of the county, that he would not investigate him as to his taxes—his omitted taxes. I think he had not exactly agreed that he would not advise the County Auditor regarding that matter at all, but at the same time it will be seen that much that was said regarding the Lockwood matter might be said as to this specification. He had placed

himself where he could not very well have candidly advised the County Auditor regarding these taxes if the County Auditor from any evidence, or from his own motion, was considering as to placing taxes upon the duplicate against Mr. Devlin. To be sure he did not enter into a written contract that he would advise the County Auditor not to do it, but simply contracted that he would not investigate it; and at the same time it can well be seen that if the Auditor had called upon him for advice touching the matter of investigating Mr. Delvia or putting omitted property on for taxation, under that contract which he had made he certainly would not have been as free in his advice to the County Auditor as the Prosecuting Attorney ought always to be. If this matter stood alone the Court might well hesitate to found a judgment of removal upon this alone, but it presents questions kindred to those in the other specifications and about the same considerations apply to it, and we are unable to say that the action of the Court of Common Pleas upon this 11th specification was clearly unauthorized and erroneous.

It is argued by counsel that the Prosecuting Attorney ought not to be removed from office for the commission of any criminal offense, such as embezzlement or anything of that kind, until he has been indicted and convicted thereof in a criminal prosecution, and I remember that cases in the 11th Ohio and the 95th Pennsylvania State were cited as supporting that sort of a conclusion. But it appears very clear from both these cases that the Court did not mean to go to the extent that the counsel here argued. The holding was simply to this effect, that where an attorney was guilty

of general criminal conduct, impropriety of demeanor which amounted to a crime, and a crime which if he committed he was really unfit to be an attorney generally, he ought to be stricken from the rolls; yet where the crime did not touch his particular character as an attorney, but was some outside general offense, as murder, or robbery, or perjury or something of that kind not touching his particular employment as an attorney, that for such a cause as that he ought not to be removed from his office as attorney until he has been indicted, prosecuted and convicted criminally; but those cases hold that if this conduct touches his conduct as an attorney at law particularly then that rule does not apply, and, of course, it would not apply.

It can hardly be contended seriously, I think, that in a case involving actually the conduct of an attorney in and about the business of an attorney, if his offense amounted to a crime nothing could be done to disbar him or remove him from office unless he was first actually tried, indicted and convicted criminally of that offense. There are some other provisions of the Statute which would require a Prosecuting Attorney to be removed if he failed in certain duties, and they go upon the idea that if there is a person in public office who is not fulfilling its duties, the public is entitled to another sort of person as an incumbent, and the matter is to be tried by the Court and not necessarily to a jury unless the Court may, possibly, under general authority refer it to a jury; but perhaps that would not be proper, at least it would not be necessary.

Therefore, regret it as we may, we find ourselves utterly unable under the rules of procedure in a court of error, to set aside or reverse this judgment, or to set aside the findings upon which it was entered. It will therefore be affirmed at the cost of the plaintiff in error.

H. L. Peake, Judge George Beis, Theo Alvord and Judge E. M. Colver, attorneys for plaintiff in error.

E. B. King, attorney for defendants in error.

SCHOOL DISTRICTS.

Proceedings to Detach Certain Territory from one Township and Attach Same to Another. Taxation. Act of 1888, 85 O. L. p. 412, Void.

(Huron County Circuit Court. April Term 1894. Present: Hons. C. S. Bentley, P. J., C. H. Scribner and G. R. Haynes, J. J.)

Phillip Eckstein, et al., plaintiffs in error, vs. The Board of Education of Chicago Junction, et al., defendants in error. Error to the Court of Common Pleas of Huron County.

SCRIBNER, J.

This is an appeal from the judgment rendered therein by the Court of Common Pleas. The action is brought to test the legality and validity of certain proceedings had in the Probate Court of Huron County, whereby it was sought to detach certain territory from the Townships of Richmond and New Haven and to attach the same to the village school district of Chicago Junction.

The revised statutes contain this language, section 3893: "A part or the whole of any district may be transferred to an adjoining district, by the mutual consent of the board of education having control of such districts; but no such transfer shall take effect until a statement or map, showing the boundaries of the territory transferred, is entered upon the records of such boards, nor, except when the transfer is for the purpose of forming a joint sub-district, until a copy of such statement or map, certified by the clerks of the board making the transfer, is filed with the auditor of the county in which the transferred territory is situated; and any person living in the territory so transferred may appeal to the county commissioners, as provided in section 3967, and the commissioners, at their first regular

meeting thereafter, shall approve or vacate such transfer."

On the 27th of February, 1893, as it appears from certain papers that are included in the evidence submitted here, there was filed with the board of education of Chicago union school district. Huron County, Ohio, an application brought under the section of the statute which I have just read, and which application reads:

"Gentlemen: We, the undersigned electors residing in the territory herein-after described, do hereby respectfully pray your honorable body to so change the boundary lines of your school district to include the following described property to-wit:

In Section 3 of New Haven Township, that part of lot 48 not already in the district; lots 27 and 28; lots 46 and 47.

In Section 2 of Richmond Township, that part of lots 25 and 30 not already included in said district; all of lots 24, 26, 29, 31 and 32. All of said described property being in Huron County, Ohio. All of which we ask to have included in Chicago Junction school district, believing it to be greatly to our educational interests, as well as that of others. And thus we shall ever pray." Signed by five persons.

There also appears among the papers, a statement certified by J. A. Pittsford, Clerk of the joint meeting, as it is subscribed, and dated Chicago, March 27th, 1892, that certain proceedings were had, under the application which I have just read at which the several boards of education refused to grant the prayer of the petitioners, so that the application, as it appears in these papers and elsewhere in the case was disallowed.

Sections 3928 to 3945 inclusive relate to

the formation of sub-districts and the provisions are of such a character as to lead us to the conclusion that they have no application to the proceedings of the character such as was subsequently had here.

Sections 3946 to 3948 inclusive relate to another proceeding having in view the accomplishment of the same purpose.

Section 3946 reads: "A petition may, in like manner, be filed with the clerk of the Board of Education of any township praying for the creation of an additional sub-district, or for changing the lines of sub-districts, or for the creation of a special school district, or for changing the lines of special or village districts, and adjoining sub-districts; but when a special or village district is interested in such proposed change, the petition may be filed either with the clerk of the township board, or the clerk of the board of education of such special or village district; and when any such lines have been so changed, they shall not be altered by any board or boards of education until after the expiration of three years, except upon the written consent of two-thirds of the electors residing within the territory affected by the change."

Section 3947 reads: "Such petition may be filed with the clerk of the board of education of such special or village district, with the clerk of the board of education of the township, or, if the changes sought by the petition affect the territory in more than one township, with the clerk of the board of education of either township; and, upon the filing thereof, the members of the board or boards interested shall be notified, as provided in section 3933."

Section 3948 reads: "It shall be the duty of such board or boards to meet and consider the petition within thirty days

from the time the same is filed, but on failure to do so within sixty days of such time, or if the board or boards meet and grant, or refuse to grant, the prayer of the petition, a petition or remonstrance may be filed with the Probate Judge of the county, by either party, as provided in section 3933; and, thereafter, such proceedings may be had thereon, and they shall have the same effect as is therein provided for the formation of joint sub-districts."

These boards of education of the three districts had their last meeting on the 27th, of March, 1892, at which time a failure to agree upon the proposition submitted, took place.

On the 28th, of April a petition was filed, at least, it bears that date, with the Probate Judge of Huron County and reads:

"Hon. G. T. Thomas, Probate Judge of Huron County, State of Ohio. Whereas, the boards of education of Richmond Township, New Haven and Chicago Junction Village School District in said county and state, having refused, at a meeting held in Chicago Junction on Friday, March 25th, 1892, to grant our petition, or any part thereof, praying to have the boundary lines of Chicago Junction School District changed. Said petition having been filed with J. A. Pittsford, Clerk of Chicago Junction School District, Feb. 27th, 1892, as prescribed by law.

Therefore, we, the undersigned petitioners and also electors, not petitioners, residents in the territory hereinafter described, do hereby most respectfully pray and petition you to appoint three judicious, disinterested men of said county, and not residents of either townships or districts to be affected by this petition, to consider the propriety of changing the

boundary lines of Chicago Junction School District, so as to include the following described property, to-wit, more or less as the commission may decide. In section 3, of New Haven Township, that part of lot 48, not already in the district; all of lots 27, 28, 46 and 47. In section 2, of Richmond Township, that part of lots 25 and 30, not already included in said district; all of lots 24, 26, 29, 31 and 32. And thus we shall pray." This is subscribed by six petitioners.

It appears that on the 25th, of May, by the record of the proceedings had in the Probate Court, a bond was filed as required by the statute, securing the payment of the costs of the proceedings in the case. Then, afterwards, on the 7th, of May, 1892, the Probate Court made an order of this tenor:

"This day this cause came on for hearing upon the petition hereinbefore filed by M. O. Rettig, et al., and the same being found in all respects according to law, and the petitioners having filed an undertaking for costs as required by law; it is ordered that T. K. Strimple, D. D. Benedict and John C. Sheffield, three judicious and disinterested men of the county, not resident of any township to be affected by this proceeding, by, and they are hereby appointed commissioners, to act in the premises; it is further ordered that said commissioners meet at the school house in Chicago Junction on the 16th, day of June, 1892, at ten o'clock A. M. to discharge the duties of their appointment, after being first duly sworn as required by law, that they may make a report of their proceedings herein, on or before the 16th, day of July, 1892; it is further ordered that notice of the filing of said petition, and of the time and place of meeting of said commissioners, be published

for four consecutive weeks in the Norwalk Reflector and the Experiment News, two papers of opposite politics, printed and of general circulation in said county."

On the 10th, of June 1892, the petitioners asked and obtained leave to file an amendment to their petition and that amendment was filed on the 11th, of the same month. The amendment sets out that the filing of the petition with the clerk of Chicago Junction School District, on the 27th, of February, 1892, was duly signed by qualified electors, residents of the territory sought to be included within the said Village School District, and that a petition was filed asking that the boundary lines of said village district be so changed as to include in such district the same territory specifically described in the petition herein. That upon the filing of said petition which was addressed to the Board of Education of said Chicago Junction Village School District, notice was duly given, in manner and form as by law required of the filing of such petition and naming a suitable and convenient time and place for the Boards of Education of said Village District and of Richmond and New Haven Townships in said Huron County to meet, that the several members of said boards were duly notified of such meeting. That more than sixty days have elapsed since said petition was filed.

The records of the proceedings in the Probate Court show the various steps that were taken in the proceeding,—the giving of notice under the statute, the motion by the attorney for the parties defendant,—a proceeding to dismiss it for want of jurisdiction, the action of the Court on that motion and the report of the commissioners and its return of the map with that report and the confirmation of the proceedings, and the report of

the commissioners by the Probate Judge on the 7th, of July, 1892.

The report of the commissioners with the map attached, forming a part of the report, shows the granting of the request substantially, of the petitioners; shows the territory which was detached from the sub-districts of Richmond and New Haven Townships and attaching them to the Chicago Junction Village School District and sets out also a description by meets and bounds, the entire territory as actually changed and constituted under this proceeding.

In their report, the commissioners say, among other things: "We find that the lines of the village district of Chicago Junction and of the adjoining sub-districts in Richmond and New Haven Townships, in said Huron County, (to wit, sub-district No. 3, in Richmond Township and No. 3, in New Haven Township,) should be so changed as to include the territory described in the petition within the boundaries of said village district, together with lot No. 45 in Section No. 3 in said New Haven Township, and all of that part of lot 23 in the second section of Richmond Township lying east of north and south road."

The commissioners then proceed in their report to give the reasons for determining upon this change. The report of the commissioners, as I have already said, was confirmed by the Probate Court.

In this petition, it is insisted that these proceedings were unauthorized and illegal, and the Court is asked to enjoin the authorities from carrying into effect or execution the change which is provided for in the action had in the Probate Court.

The prayer is, "Whereas, these plaintiffs pray that due inquiry may be made of the matter herein complained of; that

upon such inquiry, the said board of education of the village district of Chicago Junction may be forever enjoined and restrained from levying any taxes or assessments upon the lands or personal property of these plaintiffs, or of such persons as stand in like case with them, or from assuming or taking territorial jurisdiction over their lands, that the said auditor may be enjoined and restrained from assessing of taxes or assessments certified to him by said village district Board of Education against or upon the lands or personal property of these plaintiffs, or of those in whose interest this action is brought, and from entering any such taxes or assessments so assessed upon the tax lists of the said county; that the said treasurer may be enjoined and restrained from collecting, or attempting to collect from said lands or property or the owners thereof any taxes or assessments levied thereon by said Village Board or by said auditor upon the certificate of said board; that the said township Board of Education may be severally enjoined and restrained from interfering with the attendance at the schools within said districts of the children of these plaintiffs, and other persons and for such other, further and different relief as may be found proper."

Upon the argument of counsel for the plaintiffs and in his brief, filed with us, this claim is made: We contend that the application or petition filed in Probate Court, should show that the petition had been filed with the boards of education of the same townships whose territory is to be affected as with the village district, as in this case.

It may be remarked in regard to this matter, or this claim, that it is averred in the petition filed with in Probate Court,

"that the boards of education of Richmond township, New Haven township and Chicago Junction village school district, in this county and state, having refused, at a meeting held in Chicago Junction on Friday March 25th, 1892, to grant our petition, or any part thereof, praying to have the boundary lines of Chicago Junction school district changed, said petition having been filed with J. A. Pittsford, clerk of Chicago Junction school district, Feb. 27th, 1892, as prescribed by law."

If it be essential to the jurisdiction of the Probate Court to act in the matter that it be averred in the proceedings, that the application has been filed with the boards of education of the several townships to be affected and has been denied, it appears to us that this statement in the petition filed in the Probate Court upon which the foundation is laid to proceed, has complied with that requirement, that is, more particularly through the amendment filed sometime later.

We are not entirely clear that it was essential that a proceeding in Probate Court should show that a prior action was had under section 3893.

It is further said by counsel, and, the claim is made in the brief upon this point, is a part, substantially, of the general proposition which he has stated, that the application filed in the Probate Court, that the record should show that action had been taken previously, and that the boards of education had failed to meet, or, having met, had failed to agree, and that the purpose of the petition is to change the lines of the village district and adjoining districts. It is insisted that this averment is jurisdictional.

It is also suggested in the argument that the petition filed, while it did show

what territory was to be detached from the adjoining townships and attached to Chicago Junction school district, yet it did not show, and did not purport to show wherein the lines of the New Haven township district, or of the Richmond township district would be changed. But, if I comprehend correctly the proposition as stated, it would seem necessarily to follow that when the petition set forth the territory which it was sought to detach from one township and attach to another township, that thereby it was shown not only in what respects the territory thus added to was changed, but also in what respect or particulars the territory from which part was to be detached and attached to another township was to be changed.

If it be shown that it is sought to take, by certain lines, a certain defined territory from one township, or one village school district, or from a township school district and to attach that territory to an adjoining school district, it would seem, as I have just stated, to follow evidently that the change that was sought to be made in the township from which the territory was to be taken would require a corresponding change in the township to which the territory was to be attached.

There seems to be some difficulty as to what may be the result of a change like this as to the power of taxation in a school district as newly constituted, with the territory detached and the territory from the adjoining township attached to it, as to whether or not the officers of the district as so enlarged, for example, in this case, the authorities of the Chicago Junction village school district, have the authority to levy a tax upon the property of the territory which is detached from

the other two townships and added to Chicago Junction school district, or whether the parts formerly belonging to the old township districts are to be taxed by the authorities of those districts and the fund certified under the statute, so as to be expended by the authorities controlling the Chicago Junction districts. We have found some difficulty about that. We are not entirely clear in our own minds in regard to it.

We find, as reflecting some light upon the matter, this language in the section relating to classification—Section 3885 to 3891 inclusive. Section 3885 reads: "The state is hereby divided into school districts to be styled respectively city districts of the first grade of the first class, city districts of the second grade of the first class, city districts of the first class, city districts of the second class, village districts, special districts and township districts."

In Section 3886 the language is: "Each city having a population of ten thousand or more, including the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, shall constitute a school district, to be styled a city district of the first class; and each district that has heretofore been constituted a city district of the first class shall remain such."

Then Section 3887 reads: "Each city of the second class, having a population of less than ten thousand by the census of 1870, including the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, shall constitute a school district, to be styled a city district of the second class."

Section 3888 reads: "Each village, in-

cluding the territory attached to it for school purposes, and excluding the territory within its corporate limits detached for school purposes, shall constitute a school district to be styled a village district." And so on as to the township districts and special districts.

Now, take Chicago Junction village school district which seems to fall within section 3888, we find it provided as I have read, that each village including the territory attached to it for school purposes and excluding the territory then within the corporate limits detached for school purposes shall constitute a school district to be styled a village district.

Now, if this language of these different sections relating to classification of school districts is to be treated prospectively as well as presently, we find that in this case the territory which is attached to it for school purposes, together with the district as it originally stood, constitute a school district to be styled a village district, and if these proceedings in the Probate Court be effectual to the end had in view in taking them, so that the territory detached from each of these townships adjoining, Richmond and New Haven, and attached to Chicago Junction village school district, constitutes with that of the former village district, a village school district and if it is treated in that view, then the property embraced therein may be taxed by the authorities of the Chicago Junction village school district and it is not subject to the power of taxation by the old directors or board of education of the districts from which those parcels are detached, because they no longer form any part of them.

Now, although, as I say, we are not satisfied entirely with this view, this construction of the statute, yet our conclu-

sion is that that is the view to be applied to this case, and it results from that that these proceedings are to be regarded as legal and valid; that the prayer for injunction upon the part of these plaintiffs must be denied, except to this extent: There was issued by Chicago Junction school district bonds to the extent of three thousand dollars issued under authority of the act passed in 1888, contained in the 85th Ohio Laws, page 412. That act was without any doubt a special act; it is an act that undertakes to confer in terms, upon the school authorities of Chicago Junction village school district, power to borrow money and to issue bonds and the levying of taxes to provide for the payment of those bonds, and the act comes directly within the prohibition contained in section 1 of article 13, where it is declared that the General Assembly shall pass no special act conferring corporate powers. This act is a special act. About that there is no doubt. It does confer corporate powers, because it confers power to issue bonds and borrow money. That question has been many times decided; by the Supreme Court of the United States, among others.

To the extent that it is sought to charge upon the property of these plaintiffs, thus represented by them, anything for taxes for the payment of interest and principal upon these bonds the injunction should be granted, and to that extent only is granted.

Our understanding of the decision of the Supreme Court in the cases that were cited in the argument is, that the people who are brought in by proceeding duly taken under the statute, become subject to a burden of taxes assessed under valid laws. The order of the Court will be that the costs shall be divided in this case.

S. M. Young, attorney for plaintiffs.

Walker & Severance, attorneys for defendants.

TRIANGULAR LOTS.

Application of the Rule laid down in the Haviland Case. Where Council adopts one mode of Assessment, Courts have no authority to adopt another, but, may administer Equity. Legislative questions, costs, etc.

(Lucas County, Ohio. Common Pleas Court, July 10th, 1894.)

The City of Toledo, plaintiff, vs Joesph H. Ainsworth, et al., defendants.

HARMON, J.

This case of the City of Toledo for the use of certain parties, against Joseph H. Ainsworth and others, was heard last week, and we will dispose of it now.

A petition was filed in this case, and it is alleged in the petition that the City of Toledo is a corporation organized under the laws of Ohio—a city of 3rd grade and 1st. class. It alleges that the City of Toledo on May 1st, 1892, passed an ordinance to improve Front Street from the westerly line of Oak street to the westerly line of ——— street, grading the same the entire width, with drainage, etc., in accordance with the profile on file in the City Engineer's office, and due notice was given to owners of property abutting on the said street.

On the 4th of July, 1892, the city council passed an ordinance for the making of this improvement and the resolutions to assess upon the lots abutting on the improvement according to the foot front, and that the assessment should be made in accordance, one-half payable in 10 days and the balance, or remainder, one year thereafter. And in default of payment should be subject to penalty and interest to the contractor doing the work. This ordinance was approved and published twice in a daily newspaper of general cir-

culatlon in the city. Therefore the City Clerk published the same for bids, and bids were filed and opened as provided by the statutes, and W. T. Ryan being the lowest bidder, his bid was accepted by the city according to the resolution and ordinance. The contract was made on the 12th day of September, 1892. And it is also alleged that Ryan assigned his contract to Edward W. Rhodes, Trustee, and he completed it in accordance with the contract, which was accepted by the City Engineer, and after the acceptance of the contract in Sept., 1892, the city council by an ordinance duly passed, made an assessment and levied and assessed per foot front on lots bounding and abutting the sum of \$3,5804. This assessment was assigned by Ed W. Rhodes, trustee, of Ryan, and payment was ordered to be made, one-half in 10 days and the balance in one year. This ordinance was duly published according to law. The petition sets forth that the owners of the different lots abutting and bounding on this improvement were assessed to pay the expense of the same. These are in Cornwalls addition, and they are numbered in that addition from 18 to 31 inclusive. The petition sets forth the exact amount assessed upon the interest of each owner of these lots. It says that the interest in this assessment has been sold and transferred to MacGahan & Co., who are the owners of it now.

There are numerous owners in these lots who have filed answers in this cause. The answers are somewhat various; some of them general denials; others allege that this assessment is excessive, exceeding the amount allowed by law to be assessed on these lots. But the statutes limit the power of assessment to 25 per cent. of the actual value of the lots' after

making the improvement, and other defences are made alleging that the assessment is excessive, by reason of the lots not having a frontage at all upon the street; others that the front of the line of the lots on the street is much longer than it is equitable that an assessment should be made upon, and that the assessment should be adopted in part. Though that language is not used, that is the claim.

Without going into the several issues which are made in this petition, I will consider some of the claims that are made in the case, and that are insisted upon.

The principal claim is that the assessment exceeds the amount authorized by law under the statutes, limiting the right to assess for 25 per cent of the value of the lot after the improvement has been made. Another defense is made and claimed that these lots, triangular shaped lots, and lots having a very large frontage upon the street, or extending in a long line upon upon the street, or longer than others, in proportion to their depth and in proportion to their area, should be diminished in frontage. But, it is admitted that the proceedings of the Council we are regularly had; that the assessment was not invalid by failure of the Council to take such proceedings for this improvement as are required by law.

In respect to lot No. 19, which is a triangular lot, it is insisted that this lot has no frontage upon the street, that is improved, also the lot No. 18. We will say both lots, No. 18 and 19, do not front upon the street improvement, but their front is upon Oak street. Lot No. 19 is a triangular lot—it is in the form of a right angle triangle. The base of the triangle lies upon Oak street, the hypotenuse of the triangle on Front street, and it is insisted, though this lot is not improved by

its use, that its front is upon Oak street, and this front is about 52 feet. We will say that while this line of lot 19 upon Front street is considerably longer than the base of the triangle which lies upon Oak street, the owner insists that the ruling adopted in *Haviland against Columbus* should not be applied against this lot and should not be assessed against the front on Oak street. Counsel insists that on these lots, both 18 and 19, the Court should take the superficial area of each lot and divide it by the ordinary depth of lots on that street, and that the quotient should be the front given to that lot, and that would be the proper frontage.

Now as to lot 18, that evidently fronts upon Oak street. Front street cuts off one of the rear corners of the lot, and leaves a line there of about 45 feet on Front street. The real front of that lot—the frontage on Oak street, does not appear on this plat and nobody has stated what the frontage of that lot is. But counsel suggests two ways of equalizing that assessment. First, by drawing two lines from the extremities of the line of the street, in one case perpendicular to the line upon the street and the lot on the street, until it reaches the line of the lot, and take the area thus enclosed, find the superficial area contained, and divide that by the depth of lots on the street, and this should be the front. Now this comes to the same thing as assessing lots by their superficial area. The decision of the Circuit Court of Hancock County is cited here in support of that claim. Now this decision was made at the May term 1893, by the Hancock County Circuit Court, and the opinion was given by Judge Seney. The case of *Haviland vs Columbus* was decided June 20th, 1893, by the Supreme Court. There is nothing

in this decision of the Hancock County Circuit Court to indicate the day on which it was made, only that it was made at the May term. Now this at Columbus was made on the 20th day of June, 1893. It is possible that this decision by Judge Seney was made previous to the decision of *Haviland against Columbus*. Decisions in the Hamilton County Common Pleas Court are also made, but I think it unnecessary to examine any of these decisions. The Supreme Court, I think, decided this in the case of *Haviland vs Columbus*.

The case in Hancock county was disposed of on demurrer to the petition.

Haviland vs Columbus was a suit by the owners of lot No. 11, Nelson's addition to the city of Columbus, situate on the corner of Main street and Miller ave., and fronting 37½ feet on Main street, and extending along Columbus ave. 75 feet. And it was further stated that the city council by ordinance improved Miller ave, and made assessment on the fronting property for its entire length on the avenue, the entire amount of assessment being \$775.25. It is alleged in the petition that other lots on the street have a frontage of 35 feet and 150 feet in depth. They further say that under it, their lot should have only been assessed for the the frontage on the avenue which it would have had if reduced to the same depth as other lots on the street, that it has been assessed without regard to depth of other lots and wholly without regard to the benefits; that they took no part in permitting assessment. Now Sec. 2264 Revised Statutes, provides that all cases where the costs and expenses, or any part thereof are not assessed on the general tax, they shall be assessed on the abutting or other lots in proportion to

the benefits to the property, or to the value to the property or by the foot front of the property bounding and abutting on the improvement. The council in this case adopted the latter mode by foot front of the lot. You will observe that the Court remarks here, that by reason and language of the statutes where the statutes adopt the mode of assessment by foot front, it must in assessment of lots, have regard to what the front of the lot is; it may abut and yet not front on the improvement or any part thereof. Hence where it abuts lengthwise, as in this case, it must be decided whether the length is the front or not, as we understand it abuts on another front, as in this case, it be regarded as fronting lengthwise on the improvement, and the assessment should be for the number of feet the front should have—that is to say 37½ feet and no more. It should be observed in this case, that the lot of the plaintiff lay lengthwise upon Miller avenue and said improvement, but its length there was 74 feet. The depth of lots on that street was 150 feet.

The parties were making the same claim as here, that the Court should adopt another mode of assessment than that adopted by the Council; by superficial area and not by the foot front, and yet the Court says there, that this lot not having any ordinary depth, should be assessed its full frontage, 37 feet, and it was so ordered in that case.

So that the claim of the defendant here is that these lots should be reduced to a frontage such as they would have provided they went the full depth of the lots on the street. That claim is contrary to the rule laid down in *Haviland vs Columbus*. The statute provides three ways in which a city council may make an assessment:

First, in proportion to benefit which may result from improvement; second, in accordance with the value of the property assessed, and third, by the foot front of the property bounding and abutting on the improvement. The Supreme Court says in *Haviland vs Columbus* that whatever mode may be adopted the assessment must apply with uniformity to all the property that may be assessed. The assessment by foot front may not be in theory in accordance with benefits, but it is found to be more practical, because of the difficulty of applying any other method. To make it just and equitable, the council thought best to make it the foot front and not by value or benefits. The Court found, undoubtedly, that they had no power to make an assessment. The council is confined to these three methods by statute, and when the council has adopted one of those methods, and it results inequitably to the owner of any lot, the Court will administer equity in so far as possible, without departing from the method, because the Court has no power to pass upon the act of the city council, or as to an equalizer upon this assessment. So, both upon principal and authority, the Court cannot adopt the method insisted upon by the defendant Gorrill here, on lots 18 and 19.

The council has made these assessments; their proceeding were regular; they have adopted this method, and the Court is powerless to make another assessment.

We come now to consider the limitations provided by the statutes. It is provided by statute that no more than 25 per cent of the value of the lot after the improvement has been completed, shall be assessed upon any lot, and we have taken account of the evidence that has

been given of the value of these lots, and we have arrived at an estimate of the value. These lots are upon a street which extends into the water—most of them are partly covered by water, and lay there low—below the street. The street at its Westerly terminus has no outlet. As to the propriety of improving that street the city council were the sole judges. This Court is not called upon to pass on that question; that is a legislative question and the Court has to dispose of judicial questions.

It is said that none of these owners petitioned for this improvement; that it was unnecessary. But that question, as I understand it, is a question for the council alone. The Court has no authority or jurisdiction upon that question, it is a legislative one, as I have remarked.

These lots lie here, some of them, in an irregular shape as relating to this street, laying under water, and if the Court was to exercise an individual judgment, I am inclined to think we should place the value of those lots at as low a price as given by any witness in the case, but the Court is not to judge in that way; we must go by the evidence. We think some of these witnesses have placed an excessive valuation upon the lots. We have not given very much weight to their evidence; we have endeavored to weigh this evidence in accordance with the means of knowing its value, which the witness had. And without taking time to go over the lots one by one, I will announce the value that the Court puts upon the lots according to the best judgment we have been able to form upon the evidence.

The evidence upon the value of the

other lots is almost as various as upon this lot No. 18.

The Court values lot No. 18 at \$500; No. 19 at \$120.00. I will say that the defendant Gorrill says lot No. 19 is not worth over \$125.00, but we arrive at the value of \$120.00; lot No. 20, \$550.00; No. 21 at \$400.00; No. 22 at \$300.00; No. 23 at \$210.00; No. 24 at \$150.00; No. 25 at \$75.00; lot No. 26 three witnesses testified that the lot was not worth anything, and there were three witnesses testified that the lot was worth \$100.00; one witness that it was worth \$90; one that it was worth \$75.00; two, that it was worth \$25.00, and two, that it was worth \$20, and the value that I have fixed upon for that lot is \$25.00. I think that it is worth something although of very little value. Lot 26 at \$25.00; No. 27 at \$100; No. 28 at \$220.00; No. 29 at \$240.00; No. 30 at \$240.00; No. 31 at \$175.00. These assessments will be enforced to the amount of $\frac{1}{4}$ of these valuations of the different lots.

There is a question of costs here. The Court I suppose has the power of a Court of Equity to distribute the costs equitably. I think the plaintiff should recover their costs excepting the costs of evidence. The fees of the witnesses called on behalf of the plaintiff, should be charged to the city. The plaintiff only recovers their own costs; that leaves each party to pay the costs made by him. There is no order of the Court for the defendants costs; they must settle their costs.

The right of way of the Toledo & Ohio Central R. R. Company and the Pennsylvania Company, not abutting on this street at all cannot be assessed for the improvement.

P. A. MacGahan, for plaintiff,

R. S. Holbrook, W. S. Thurston and A. W. Eckert, for defendants.

Toledo Legal News.

OFFICIAL LAW JOURNAL OF LUCAS
COUNTY, OHIO.

In the matter of the designation of a daily Law Journal in Lucas County. As required by Sec. 1 of an Act passed April 14th, 1884 and amended Feb'y 25, 1886, entitled "An Act relating to the posting of court calendars and legal notices in certain counties," as amended May 9, 1894, the Judges of the Courts of Record in said County other than the Circuit Court, hereby jointly designate the TOLEDO LEGAL NEWS, a daily law journal published in said County, as the journal wherein until the further order of said Judges, shall be published all the notices, advertisements, abstracts and matters and things specified or referred to in said Section 1.

Approved { GILBERT HARMON,
KEUREN C. LEMMON,
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Quite recently an action was commenced in the Lucas County Common Pleas Court by Prosecuting Attorney Barber, in behalf of the County Treasurer, against the Toledo Consolidated Street Railway Company, for the recovery of general taxes and assessments. The several causes of action represented amounts aggregating about \$65000, the bulk of which is in assessments for street improvements or paving. No one supposed for an instant that the Consolidated Company had permitted taxes or assessments, regarded as legal or valid, to become the subject of a suit and it has since been a matter of some speculation as to what the defense would be. Something quite in keeping with the general ripping up of assessments by the corner lot decision, known as the Haviland case, has been expected and will, it seems, be forthcoming.

The preliminary steps have not yet been taken, but Mr. Barton Smith, of Baker, Smith & Baker, Attorneys for the

Consolidated, at the request of the LEGAL News, has outlined the theory upon which the claim of the County, and subsequently that of the City, will be contested.

Mr. Smith is of the opinion, first, that there is no statute by which the County Treasurer is authorized to collect assessments levied by the City for paving between the rails of the street railway tracks. In the absence of a statute conferring such authority the County Treasurer has no power to proceed. Therefore, if the first, and technical, defense is successful, the City will be obliged to undertake the collection. It will then be urged that the relations between the City and the Consolidated Street Railway Company, under which the work of paving was done, were purely contractual and the work should not be the subject of an assessment; that it should be charged and paid for as any other work would be. Under this view of the case, the character of the pavement will be brought into question, and that is the subject matter of the real defense.

The pavements for which the Company has been assessed, Western avenue for instance, are worthless, it is said. If so, and the earlier stages of the skilful defense are successful, it will be urged that the City cannot recover for the worthless pavements. The Consolidated will show that while the work was in progress the Company protested against the manner in which it was being done and against the material etc., used; these protests, it is said, had no weight, the Company being treated as if it had no interest in the matter and no right to question methods or materials employed.

A determination of the questions of fact necessarily involved, if the real defense is reached, mean a thorough investigation of the character of the paving on many of the streets in Toledo, and incidentally the manner in which all parties have been treated by contractors, officials and others who have had to do with the work, either in letting the contract, giving the Company a chance to do its own paving, or accepting inferior

work from those to whom the contract was awarded.

Some questions of law are involved in the case which have not been adjudicated in Ohio, or elsewhere, so far as is known. Like many others now before the Courts they are the result of new conditions. From almost any standpoint the suit promises to be an unusually interesting one, and, except as to the questions of fact, of interest and importance to other cities in Ohio.

Cincinnati Judges appear to have different views of the rights of Building and Loan Companies. We take the following from the Court Index of August 30th:

The recent decision of Judge Kumler in the case of Harrison, assignee, vs Leslie et al, involving the question whether a building association can legally collect as large a fine as twenty cents a share per week, is in conflict with a decision announced by Judge Buchwalter on April 2, 1892. The decision referred to was in the case of the Gilt Edge Building Association vs Walz et al, an action for foreclosure for default. In accordance with the constitution of the Gilt Edge Association fines of 20 cents a week were charged against the delinquent.

Judge Buchwalter held that such an assessment of fines is extraordinary and excessive, shocks the ordinary sense of justice, and should be rejected as unreasonable, and a decree given for one-half the amount of fines claimed, conforming with the uniform rate assessed against deposit members [as distinguished from borrowing members]. The Court reasoned that a fine of twenty cents a week on shares paying fifty cents a week amounts to forty per cent., and exceeds the reasonable limit which the law grants to Associations. Continuing, the Court said:

"The rate of fine in associations in this county submitting their rules and constitutions to judgment of the courts has, almost without exception, been either ten or twenty per cent of the default dues. Such a rate reasonably covers all the loss imposed on the association by

reason of the default. The merit and object of such fines in these mutual associations is to keep each member performing his mutual obligations to his fellows, and if failing to do so, his fines will make all reasonable amends for his default."

The decree in the case in which the above decision was rendered recited that the fines assessed were excessive and illegal. Judge Kumler's decision in the Leslie & Dicks case proceeded upon the theory that a borrowing member should be held to his contract, which was in this case to pay a fine of twenty cents a share per week in case of default. Mr. E. S. Ashton, who represents the assignee, and hence the general creditors, has moved before Judge Kumler for a rehearing. If that is denied he will go to the Circuit Court on error.

The Supreme Court of New York—Special Term—Kings County—has modified the injunction against Lillian Russell, holding that the contract set forth does not apply to the summer months. A syllabus of Judge Barrett's opinion, taken from the New York Law Journal of Aug. 23rd, 94, is as follows:

Where a theatrical "star" contracts with theatrical managers to perform for them for two theatrical seasons, the first commencing November, 1893, and continuing to June, 1894, and the second commencing October, 1894, to June, 1895, although the contract contains a negative covenant "that during the *continuance of said contract* the said 'star' will no. perform or give any exhibition of her talents at any place or for any persons other than the said theatrical managers."

Held, 1. That the fair meaning of the parties should control, and that the contract did not cover the summer months; and that it would be a too restricted interpretation of the words "the *continuance of this contract*," to hold that the "star" was restrained from singing during the summer months under any other management than the plaintiffs'.

2. Further *Held*. That representations made by plaintiffs, which did not con-

stitute material inducements to enter into the contract, cannot be urged as a defense for a breach thereof on the part of the defendant.

3. Further *Held* That, although an injunction for the enforcement of a negative covenant will not ordinarily be granted before a full inquiry into the facts has been had by means of a trial, still the jurisdiction of the Court to grant an injunction for the enforcement of a covenant not to perform for rival managers is well established and can always be invoked in a proper case.

The temporary injunction recently allowed by Judge Harmon, at Chambers, restraining the City of Toledo from enforcing the resolution directing the Street Commissioner to remove fruit vendors' stands from the sidewalks was dissolved on Monday, upon the hearing of a motion filed by City Solicitor Watts, for that purpose. The plaintiffs, represented by Judge Ritchie, gave notice of appeal and the injunction remains in force up to and including September 1st, to permit the parties to bring the matter before the Circuit Court. This will probably be done to-day.

The ordinance under which owners of buildings have leased the sidewalk in front of their buildings, and upon which the plaintiffs in the suit above referred to relied principally, is section 643 R. O. of Toledo. Its provisions are, in substance, that it shall be unlawful for any one to place or set out goods or merchandise of any kind, *for exhibition*, on the sidewalk in front of any store or building except within a distance of three feet.

This ordinance, the Judge held, gave the owners no right to lease the space referred to for the sale of merchandise or to use it for that purpose themselves.

The case will be more fully reported from the Circuit Court.

The constitutional and statutory limitations on the creation of debts by cities have become so important in many places that the question what constitutes "an indebtedness," within the meaning of these provisions, is one of public interest.

This question is answered so far as the courts have decided it, in a note to the case of *Beard vs Hopkinsville (Ky.)* 23 L. R. A. 402. In that case it was held that a contract by a city to pay an annual rental for the use of hydrants and electric lights was the contracting of an indebtedness, although the usual income of the city was sufficient to pay its current expenses, including the rentals under that contract. It is certainly difficult in some cases to decide whether or not this limitation on the amount of indebtedness shall prevent the making of a contract or something immediately needed in the line of current expenses, in case the cash to pay for it is not at that moment in the treasury.

Whether or not a chattel mortgage gives the mortgagee the right to take possession of the chattels at his pleasure is a question of much interest to some people. This power is held to exist in *Robbins vs Gray*, 23 L. R. A. 780, where the mortgage says he may do so when he "shall choose," but a clause allowing him to take possession if he "deems himself unsafe," or something similar to that, is shown by the annotation to the case to have been variously construed. Probably most people, and possibly some lawyers, do not know that, in the absence of any clause on the subject, a chattel mortgage gives the right to take immediate possession of the property, although the debt is not due; and the curious result is that a clause authorizing the mortgagee to take possession in case he feels unsafe, if it has any effect at all, really limits his rights.

Notwithstanding the immense volume of business disposed of at the last, April, term of the Common Pleas Court, in Lucas County, the September docket is larger than that of any previous term. It has just been completed and contains 1398 cases, about 200 more than the docket for last term.

We are indebted to The Albany Law Journal for the address of Hon. John P. Dillon, read before the American Bar As-

sociation, "The True Professional Ideal" which is published in this number of the **LEGAL NEWS**. Anything which Judge Dillon might say would be of interest and his lofty conception of a lawyer's duties, what his aim and work should be, is worthy of careful reading. The address also makes practical suggestions on the subject of legal education.

The meeting of the American Bar Association at Saratoga Springs, N. Y., held last week, was a most successful one. Legal Education held a prominent place among the subjects most discussed and it may be reasonably expected that the result will be to advance the efforts which, in many states, are being put forth to raise the standard of requirements for admission to the bar.

Whether or not one whose property is destroyed by fire because of the failure of a water supply can recover damages from the water company which has contracted with the city to supply the water is a very practical question which is answered in *Howsman vs Trenton Water Co.* (Mo.) 23 L. R. A. 146, in the negative. The annotation to the case reviews the decisions as to the liability of the water company and also the municipality in such cases.

On Monday, Labor Day, the corner stone of Lucas County's New Temple of Justice will be laid. Hon. John H. Doyle will deliver the address and Judge E. D. Potter Jr. is on the program for a pioneer statement. D. L. Stine, of Toledo, is the architect of the building, which is being constructed by Dun, Perley & Co., contractors of Columbus. The total cost will be about \$500,000.

Judges Scribner and Bentley heard a motion at Chambers, Wednesday, to suspend the order of Common Pleas Court of Sandusky County, dissolving the injunction in *Fuller vs Haff*. The case is a ditch matter and is on the same record as the one involved in *Haff vs Fuller*, reported in 45 O. S. Hon. John M. Lem-

mon, Judge A. B. Levisce and D. A. Heffner represented the various interests. Decision was reserved until to-day.

On account of delay in sending us copy for names in our proposed Legal Directory of Ohio, it has been necessary to delay its first publication until next week. At that time we hope to have the list complete and ready for publication. It will be given a suitable place and must prove, we have reason to think, a valuable medium for those who desire the services of Attorneys at different points in Ohio.

It becomes a question of great importance to tenants of rooms or parts of buildings whether or not the landlord is under an implied obligation to keep the roof or upper portion of the building above them in good repair. This is denied in *Jones vs Millsaps* (Miss.) 23 L. R. A. 155, and the numerous authorities on the question are fully presented in a note to the case.

U. S. Circuit Court

Northern District of Ohio—Western Division.

Filings.

945—Ohio Coal Exchange vs O. W. Shipman. Bill of exceptions, petn for writ of error, assign't of errors, order allowing writ of error and bond on writ of error; and writ of error. Swayne, Swayne & Hayes, solrs.

1094—The Hebrand Co. vs Merrill et al. Petition for appeal. Assignment of error, allowance of appeal and bond

Leavens et al vs Chas. R. Bronson et al. Application for leave to lease premises. Parks & Parks, solrs.

U. S. District Court

The Toledo Fuel Co. vs tug Mary A. Green and owners M. I. Wilcox, Chas. Hubbard and J. N. Dewey & Co. Libel for fuel supplies, \$163.07. F. W. Rickbaugh, proctor.

THE TRUE PROFESSIONAL IDEAL.

A paper read before the American Bar Association at Saratoga August 23, 1894,
by John F. Dillon.

I have been honored with an invitation to read before the Section on Legal Education a paper on "The True Professional Ideal," with the implication, I presume, that it should have some relation to the subject of legal education in one or more of its many aspects.

The time limit fixed of thirty minutes or less will not enable me to do more than to glance hurriedly at one or two of the more important questions that might be fitly considered under the general title of "The True Professional Ideal." It can never, I think, be entirely out of place,—certainly, in my opinion, it is not out of place at the present time,—to impress upon the bar and society the essential dignity, worth, nobility and usefulness of the lawyer's calling. The true conception—ideal, if you please—of the lawyer, is that of one who worthily magnifies the nature and duties of his office, who scorns every form of meanness or disreputable practice, who by unwearied industry masters the vast and complex technical learning and details of his profession, but who, not satisfied with this, studies the eternal principles of justice as developed and illustrated in the history of the law and in the jurisprudence of other times and nations so earnestly that he falls in love with them, and is thenceforward not content unless he is endeavoring by every means in his power to be not only an ornament but a help unto the laws and Jurisprudence of his State or nation. In his conception, every place where a judge sits,—although the arena be a contentious one where debate runs high and warm,—is yet over all a temple where faith, truth, honor and justice abide, and he is one of its ministers. With what majestic port may not the lawyer approach that temple when he reflects that he enters there not by grace, but of right, craving neither mercy nor favor, but demanding justice, to which

demand the judicial organs of the State must give heed under all circumstances and at all times.

There is, I fear, some decadence in the lofty ideals that have characterized the profession in former times. There is in our modern life a tendency—I have thought at times very strongly marked—to assimilate the practice of law to the conduct of commercial business. Between great law firms with their separate departments and heads and subordinate bureaus and clerks, with their staff of assistants, there is much resemblance to the business methods of the great mercantile and business establishments, situate close by. The true lawyer,—not to say the ideal lawyer—is he who begrudges no time and toil, however great, needful to the thorough mastery of his case in its facts and legal principles; who takes the time and gives the labor necessary to go to its very bottom, and who will not cease his study until every detail stands distinct and luminous in the intellectual light with which he has surrounded it. The temptations and exigencies of a large practice makes this very difficult, and the result too generally is that the case gets only the attention that is convenient instead of that which it truly required. The head of a great firm in a metropolitan city, a learned and able man, was associated with another in a case of much complexity and moment. He expressed warm admiration of the printed argument of his associate counsel, which had cost the latter two months of laborious work, adding however that he could not have given *that* much time to it because commercially regarded it would not have paid him to do so.

It is unquestionably the duty of the profession to preserve the traditions of the past—to maintain lofty ideals—and to this end to guard against what I may perhaps truly describe by calling it the "commercializing" spirit of the age. The utterance of Him who spoke with an authority greater than any lawyer or judge, "man lives not by bread alone," should never be forgotten or unheeded by the lawyer, and will not be by any who come within

the category of what may be termed the "Ideal Lawyer."

Mr. J. H. Benton, Jr., of the Boston Bar, under the conviction that few persons, even among those of the profession, realized the full extent in which the bar has participated in the government of this country and given direction to its policies and public affairs, read before the Southern New Hampshire Bar Association, in February of the present year, a most instructive paper on the "Influence of the Bar in Our State and Federal Government."

A few of the facts which he has laboriously ascertained and stated may be here briefly mentioned as bearing upon the subject of the present paper. Of the 56 signers of the Declaration of Independence 25 were lawyers, and so were 30 out of 55 members of the convention which framed the Federal Constitution. Of the 3,122 Senators of the United States since 1787 2,068 have been lawyers; of the 11,889 Representatives, 5,832 have been lawyers. "The average membership of lawyers in both branches of Congress from the beginning has been 35 per cent." In the present Constitutional Convention of the State of New York 133 out of the 175 members are members of the bar. Lawyers constitute, as nearly as can be ascertained, one in every 400 of the male population of the United States at the present time. The statistics show, with one exception, that in the Legislature of all the States the legal profession has, and always has had, a membership excessively greater in proportion to its number in the population of the State.

Not less marked is the influence of the bar in the executive departments of the Federal and State governments. Of the 24 presidents 19 have been lawyers, and Mr. Benton states that "of the 1,157 governors of all the States 578 of the 978 whose occupations I have been able to ascertain have been lawyers."

It is scarcely necessary to mention the fact that the entire body of the other co-ordinate department of the national and State governments—the judiciary—have been members of the profession. And in

our polity the judiciary have a power and are clothed with a duty unique in the history of the governments, viz, the power and duty to declare legislative enactments and executive acts which are in conflict with the written Constitution to be for that reason void and of no effect. In this America has taught the world the greatest lesson in government and law it has ever learned, namely, that law is not binding alone upon the subject, and that the conception of law never reaches its full development until it attains complete supremacy in the form of written constitutions, which are the supreme law of the land, since their provisions are obligatory both upon the State and upon those subjected to its rule, and equally enforceable against both, and therefore *law* in the strictest sense of the term.

Two forces in society are in constant operation and are necessary to its welfare, if not to its very existence: the conservative force, to preserve what is worth preserving; the progressive, without which we would have stagnation and death. The character and the state of the law, as well as the social condition of any people, is the result of the conflict between these healthful although antagonistic forces. As the ocean keeps itself pure by the constant movement and freedom of its waters, so the like movement and freedom are necessary to preserve what is good in existing conditions, or to remedy what is either bad or inadequate.

Changes in the law of any living and progressive society are therefore absolutely necessary in order to make the law answer the current state and necessities of the social organism. So far as law is expressed in written form, whether in constitution or statute, it is crystalized and almost, although perhaps never quite, stationary. Owing to the doctrine of judicial precedent as it exists in our law, this theoretically makes what is adjudged almost, although in practice not quite, as stationary as law in written form. True wisdom requires that the law shall with all convenient speed be made to harmonize with existing needs. This makes law amendment or reform a constant, continuing and ever existing necessity.

It is pertinent here to observe that no-

thing is more difficult than the work of law improvement. It requires a knowledge of the law both theoretical and practical; scientific, so as to know the relation of each department of the law to every other department; practical, so as to appreciate existing defects and the needed remedy. Doctrinaries, jurists and legal scholars may see, indeed are often the first to see, or to suggest and urge the required changes, but are, generally speaking, incapable of wisely effecting them. With the notable exception of the changes wrought in the law of evidence, Bentham's vast labors bore almost no direct fruit. Austin filled for many years a large space in the field of jurisprudence. My own judgment is that his legal theories have proved to have little intrinsic or permanent value. Though feeling constrained to say this, I must also add that in my opinion the world is much indebted to these eminent men for their bold and free criticisms of our laws and for arousing the attention of the bar to the need of amending them, and especially for making some portion at least of the profession in England and this country feel the need of some more scientific jurisprudence. Brougham, Mackintosh, Romilly and Langdale were, in a way, their disciples and labored faithfully in the cause of reform in England. But they went about it in the conservative and timid manner so characteristic of the English mind. Their efforts were confined to single, sporadic, specific ameliorations of certain felt grievances, but their labors proceeded upon no scientific plan to effect comprehensive reforms of either substantive law or of the law of procedure.

Such, roughly sketched, was the general condition of law reform when the late David Dudley Field entered upon the work of law amendment in this country. It seems to me that the career of Mr. Field illustrates several phases of the subject under discussion. For this reason, as well as because it is proper that some notice should be taken in this body of the labors of this eminent man, at one time the president of the association, I shall refer for a few moments to the main work of his life and endeavor to draw from it

the lesson it teaches. In my judgment no mere doctrinaire or closet student of our technical system of law is capable of wise and well-directed efforts to amend it. This must be the work of practical lawyers. Mr. Field had this needed qualification, for he was throughout his long career at the bar a busy and active practitioner.

When Mr. Field commenced his work of law improvement, the gap between the law as it existed and what the welfare of the community required, especially in the law of procedure, was very wide. The system of pleading and procedure had grown to be so technical as to defeat in many cases the cause of justice. This was eminently true of the common law system of pleading and procedure, and even the system of equity was equally open to the reproach of undue technicality and of intolerable delays. The need for a cheaper, simpler and more expeditious procedure at law and in equity had become a crying want. Mr. Field, if he did not originate the idea, clearly put himself at the head of the movement to remedy the evil. This he did at an early stage in his professional life, and to this as well as to the codification, looking to improvement in criminal law and procedure, as well as in substantive law, he gave without ceasing, being instant in season and out of season, more than fifty years of his career. He advocated the principle of codification everywhere. He was a man of strong feelings and passions. Every man of real force is so, almost necessarily. He therefore fought for codification; and he fought with dauntless courage everybody who opposed him. We may think that he unduly estimated the scope, the value and the beneficence of codification. He may have done so. Effective and true reformers are apt to go too far. But this detracts not the least from the estimation in which he is justly entitled to be held by the bar and public. I do not wish to surround him with a haze of golden panegyric. He does not need it. Look at his public labors in municipal and international law, extending from 1839 to 1894, and what

lawyer in this country, dead or living, has ever dedicated half as many years as he to conscientious efforts to improve our laws and jurisprudence. In this view he stands without a peer. Consider the success which has crowned his work in this country and in England and in the English colonies, and his career is strikingly distinctive. True some of his schemes of law amendment failed of adoption, those more especially relating to the codification of the common law, but he seized upon one principle which he made eminently successful and which in turn made him famous and justly so, namely, the simplification of the law of procedure. The New York Code of 1848, in substance or principle, Mr. Field lived to see adopted in a large majority of the States and Territories of the Union, and in the Judicature Act of 1873 of the British Parliament.

Mr. Field had lofty professional ideals of the lawyer's duty toward the law. Love of the pecuniary gains of his calling, though he was not insensible to them, was yet ever subordinate in his regard to those public labors which he felt that he owed to his profession and the law. Although in active practice in a great metropolitan centre for over sixty years, he accumulated no more than some contemporary men at the English bar and perhaps some in the same city have done in less than a tenth of the same period. But it may be said that he was ambitious, that his ambition was boundless and that this was his incentive. Be it so. So, doubtless, it was. Exercised for worthy ends, this, so far from being the last infirmity, in the highest quality of noble minds. Nor had official place, either for the conspicuousness which attracted and was flattered by the public gaze, or for the power which men of lower aims who live only in the present, love to wield, any controlling charms for him. His eye was lifted higher and was fixed chiefly on the generations who should come after him. Of the present he regarded himself, if I may so phrase it, as a tenant for life, but with a reversion in fee in the limitless future. Cheerful in the prolonged autumn of his days, he had for nearly

a generation seen the "leaves fall over the roots of the tree of 'life,'" but this as he looked above only gave to his vision a freer and more unobstructed view of the past and future. With great felicity of expression, Sir Walter Scott makes Kemble, on finally leaving the Edinburgh stage, say he hoped to enjoy

"Some space between the theatre and the grave;

That like the Roman in the Capitol,
I may adjust my mantle ere I fall."

Such, too, was Mr. Field's hope, doomed however to disappointment. On his return from Europe, only three or four days before he passed beyond the range of our mortal vision, he was reported to have said, in answer to the question what he intended to do, that he expected to spend the coming summer in the Berkshires at work on his autobiography, and that his one great ambition was to have his code adopted all over the English-speaking world. All old men live in the past, and to this Mr. Field, who had crossed the Delectable Mountains and was already in the country of Beulah, was no exception. It was natural that he should love to survey, in the serene evening of his days, the toils and labors which had marked his active life and successes with which these had been rewarded. But only men of higher type can turn as turn he did, to the future, see it spread itself out before their enraptured gaze, feel themselves fanned by its intoxicating breezes, behold its sunlit heights and proudly feel that it, too, is their inheritance.

With this let us contrast the life and professional career of an eminent English contemporary of Mr. Field's earlier life. I refer to Sir William Follett, who in his day was as distinctly the leader of the bar as was Lord Erskine in his. The picture has been drawn by Sir William's own friend, the accomplished Talfourd, who in his "Vacation Rambles," tells us that there was brought to him in 1846, when on his journey through Italy, the usual register of visitors, and that, turning over its pages, he was startled by the name of Sir William Follett written in tremulous characters before his death, which had occurred but a short time before Talfourd saw his signature. After reviewing Follett's professional

career, usually pronounced so brilliant Talfourd mournfully inquired, "what remains?" And he answered, "a name dear to the affections of a few friends; a waning image of a modest and earnest speaker, though decidedly the head of the common law, bar; and the splendid example of a success embodied in a fortune of £200,000 acquired in ten years, the labors of which hastened the extinction of his life; these," he added, "these are all the world possesses of Sir William Follett. To mankind, to his country, to his profession, he left nothing; not a measure conceived, not a danger averted, not a principle vindicated; not a speech intrinsically worth preservation; not a striking image, nor an affecting sentiment; in his death the power of mortality is supreme. How strange—how sadly strange—that a course so splendid should end in darkness so obscure."

Follett did not discharge the debt he owed to his profession, and therefore did not answer to the completest professional ideal of the lawyers. Mr. Field not only paid the debt due to his profession, but overpaid it and thus became its creditor, and in this answered more fully than lawyers like Follett the professional ideal.

In the report on legal education before mentioned it appears that there are over fifty law schools in the United States, having a membership of more than six thousand students—the committee not having the means of ascertaining the number of students who were pursuing their studies in private offices outside of the law schools. I fully concur in the following observations of the committee. Their soundness will not be questioned, I think, by any one who hears me: "The mind of the lawyer is the essential part of the machinery of justice; no progress or reforms can be made until the lawyers are ready. Their influence at the bar, on the bench and in legislation is practically omnipotent."

The following observation seems to me to be specially weighty and important: "The progress of the law means the progress of the lawyer; not of a few talented

men who are on the outposts of legal thought, but the great army of the commonplace who contribute the majority of every occupation. What the lawyers do not understand or what they pronounce visionary or impracticable will not be accepted by the legislatures or courts of the country."

It is no part of my purpose to offer any observations upon the methods of law instruction, much less upon the different or competing methods of such instruction. Doubtless the method of teaching law or how it can best be taught is an important subject, but it is not all important. It is wise to discuss and consider it, but it would not be wise to let it engross our whole or even chief attention. What Pope said of forms of government may, I think, be said with much more justness of methods of teaching: That which is best administered is best." The man whom nature designed to be a teacher of law will, despite theories, teach it after his own manner. He will impress his personality upon his work. It is the man, not the method, that tells. The crucial test is whether the teacher can inspire a living interest in the student and get from him the best work that in him lies; for, after all, the student must himself do the work and the thinking which shall accomplish him in the learning of his profession. Vastly more important therefore than the methods of teaching is the course of instruction or the branches to be taught.

This general subject is very fully, and, I need not say, ably discussed in the report of the committee on legal education of this association, submitted in 1892. After reviewing the course of instruction in the law schools of this country (and it is substantially the same in all of them) the committee say:

"It is evident that the course of study, with a very few exceptions, is confined to the branches of practical private law which a student finds of use in the first years of his practice. It is a technical or philosophic view of the law which is taught. It may be said of all our law schools that the instruction is too

technical. It is not elementary enough. The view of the law presented to the student is technical, rather than scientific or philosophical."

What is meant by the course of instruction being confined to private law which the student will find of practical use in the earlier years of his practice, may be illustrated by the course of instruction in what is justly regarded as one of the very foremost law law schools of this country, that of Harvard University. I select it for illustration because of the deserved eminence of the school and because it covers all the studies embraced in a three years' term. The following synopsis I assume to be correct, being taken from the above-mentioned report of the committee on legal education:

"Law School of Harvard University, Cambridge Mass., nine instructors, 363 students, 44 graduates; 36 weeks in school year.

"Course of Study: First year—Contracts, 108 hours; criminal law and procedure, 72 hours; property, 72 hours; torts, 72 hours; civil procedure at common law, 36 hours. Books used: Langdell's Cases on Contracts; Chapin's Cases on Criminal Law; Cray's Cases on Property, vols. 1 and 2; Ames' Cases on Torts; Ames' Cases on Pleading.

Second year—Agency, 72 hours; bills of exchange and promissory notes, 72 hours; law of carriers, 72 hours; contracts, 72 hours; evidence, 72 hours; jurisdiction and procedure in equity, 72 hours; property, 72 hours; sales of personal property, 72 hours; trusts, 72 hours. Books used: Ames' Cases on Bills and Notes, Keener's Cases on Quasi Contracts, Langdell's Cases in Equity Pleading, Gray's Cases on Property, vols. 3 and 4, Langdell's Cases on Sales, Ames' Cases on Trusts.

"Third year—Constitutional law, 72 hours; corporations, 62 hours; jurisdiction and procedure in equity, 72 hours; partnership, 72 hours; property, 72 hours; surety and mortgage, 72 hours. Books used: Ames' Cases on Partnership, Gray's Cases on Property, vols. 5 and 6.

Extra courses—Patent law, 10 lectures;

peculiarities of Massachusetts law and practice, 2 hours a week.

"Admission and methods of instruction.

—Applicants for admission not graduates of a college are examined in Latin (Caesar, Cicero), Blackstone's Commentaries. Every student who has been in the school one year or more has an opportunity each year of arguing in a case before one of the professors in a moot court."

The subjects taught and the books used show more clearly than any general description the intensely technical and practical character of the course of instruction. This may stand, as I think, as the general model or even highest type of legal instruction in this country.

I agree in the main with the spirit of the criticisms of the committee which I have quoted above, but I would phrase my own views in somewhat different language. I insist, for I believe it to be true, that the stereotyped course of legal instruction in this country is defective, not so much for what it contains as for what it omits. It is defective in that no adequate provision is made for instruction in historical and comparative jurisprudence, and in the literature, science and philosophy of the law—in what may perhaps be compendiously expressed as "general jurisprudence." If this is what the committee means by the expression that the course of instruction is too technical, I agree to it. But it is to be remembered that it is of the essence of our legal systems that they are in their historical development and nature technical, and so far as they are so, instruction, to be adequate and thorough, must itself be technical, and in an important sense it is not predicable of it that it is too technical. Having in view the circumstances which surround the subject of legal education in this country, I approve the wisdom of the general course of instruction in our law schools, so far as it gives chief attention to the usual and enumerated branches of practical private law. But I still insist that it is defective in the want of adequate instruction in the history and the literature of the law and

in what I call for short "general jurisprudence."

Great lawyers like Coke and Blackstone and Eldon may be made by the current methods; but the growth of greater lawyers like Hale, Bacon and Mansfield, who in their day wisely amended and improved the law, and who represent the higher professional ideals, is not adequately promoted or encouraged by the existing course or methods of law instruction in the law schools in this country.

I fully realize that to set up an impracticable standard defeats the object sought. Nevertheless I insist that it is entirely practicable for our law schools to enlarge and liberalize the scope of their instruction by requiring at least one hundred hours of the course to be given specifically to the subjects which I have ventured to indicate as essential to any well ordered course of instruction that makes any just claim to being adequate or complete.

And this view it is the sole practical point of this paper to urge and enforce, to the end that the generations of lawyers who shall come after us may be adorned more abundantly than else had been with examples of the highest and truest professional ideals.

And to this end, moreover, I should be glad to see the members of the section on legal education take the initiative by recommending the American Bar Association to adopt a resolution in substance that in its judgment adequate instruction in historical, comparative and general jurisprudence is an essential part of a thorough course of legal education, and that accordingly it recommends to all of the law schools of the country that such instruction should be made a distinct and specific branch of the course of required study therein.

The Toledo Legal News,

—\$3.00 PER YEAR,—

In Advance.

NEGLIGENCE.

Accidents at Railroad Crossings.

(Supreme Court of New York, General Term, Fourth Department, July 1894. Present: Hons. Geo. A. Hardin, P. J.; Celover E. Martin and Milton H. Herwin, J. J.)

Charles A. Pitts, as administrator, etc., respondent, vs. New York, Lake Erie & Western Railroad Company, appellant.

Appeal by defendant from a judgment entered on a verdict at Circuit.

D. C. Robinson, for appellant.

Bacon & Aldridge, for respondent.

MERWIN, J.

This action is brought for the recovery of damages for the death of Margaret Pitts, the wife of the plaintiff, Charles A. Pitts, at a collision between a passenger train of defendant and the carriage in which the deceased was riding, at about 11 o'clock in the evening of November 30, 1892, at the railroad crossing on Pennsylvania avenue, in the City of Elmira. The claim of the plaintiff is that the collision and death were occasioned by the negligence of the defendant in the management of its train. The evidence is, we think, sufficient to support the conclusion of the jury in this respect.

The main question here is whether the evidence justified the submission to the jury of the question of contributory negligence. The deceased lived, with her husband, a short distance outside of the city; and upon the evening in question they, with some of their friends, had been in attendance at a play at the opera house in the city. Shortly after 11 o'clock they started for home. One William Conklin, who was a nephew of the deceased, asked her to ride with him, and

she did so, her husband riding with another party. Conklin had an ordinary platform spring wagon, with two seats, and drawn by one horse. There were five in his party. Conklin was the driver, and he, with another man, occupied the front seat; and the deceased, with two other ladies, was on the back seat, the deceased sitting between the other two. They drove along Pennsylvania avenue in a southerly direction, and the train with which they collided came from the easterly direction, and was on the northerly or west-bound track. Upon the easterly side of the street, as they approached the crossing, there were some obstructions to an easterly view. There was a building occupied as a lumber office; there was a number of lumber piles; and there was a box car and some flat cars on a switch or side track that was laid for the benefit of the lumber yard, and reached to the street. There is evidence that the box car was close to the street. This switch or side track was about 33 feet from the west-bound track in a direction at right angles with it, but, by reason of the railroad running in an oblique angle with the street, the distance one would travel in driving on the street from the line of the switch to the same track was about 45 feet; and there was a rise of about two feet, as the main track was there higher than the ordinary line of the street. The view easterly between the switch and the main track was somewhat interfered with by several telegraph poles a foot in diameter, some of them having braces, and also by a semaphore, and in the night there were also switch lights and a semaphore light. There were gates at the crossing, but they were not operated after six o'clock in the evening, and there was then no gateman or flagman. At the collision all the per-

sons in the carriage were killed except the driver. He was called as a witness, and testified that as he approached the crossing, and when he got far enough by the cars on the switch so he could see easterly, he stopped his horse, and looked and listened; looked both ways—up the track and down the track; looked eastward as far as he could, and could see nothing, only some switch lights down the track; that he then drove on, on a walk, and was on the track when he first saw the light of the engine, and was not able to get across in time to avoid the collision. He also testifies that as they approached the crossing, Mrs. Pitts asked him "to stop and listen for a train, and see if I could see any, and I did so." The horse was a gentle one, not afraid of the cars, and Conklin was accustomed to driving. All the parties were familiar with the crossing. There was evidence tending to show that no bell was rung or whistle blown within hearing distance of the crossing, and that the train was going at the rate of about forty miles an hour. Quite a strong wind was blowing from the northwest. There was evidence on the part of the defendant that, at the point 42 feet on the street from the crossing, a traveler could see easterly an engine on the track, 1,800 feet distant. This, however, was disputed by the plaintiff, so far as applicable to the night in question.

The absence of contributory negligence may be shown from circumstances (*Hoag vs Railroad Co.*, 111 N. Y., 199; *Chisholm vs State*, 141 N. Y., 249; *Johnson vs Railroad Co.*, 20 N. Y., 65.) The fact that no one can testify that he saw the deceased look both ways and listen does not necessarily show that she did not do her duty in that regard. (*Massoth vs*

Canal Co., 64 N. Y., 524; *Beckwith vs Railroad Co.*, 54 Hun. 446, affirmed in 125 N. Y., 759; *Sherry vs Railroad Co.*, 104 N. Y., 652.) In *Tolman vs Railroad Co.*, (98 N. Y., 198) it is said that if such facts and surrounding circumstances are shown as reasonably indicate, or tend to establish, that the accident might have occurred without negligence on the part of the deceased, the question of contributory negligence is for the jury, although there were no eye witnesses of the accident. Nor can it be said, as a matter of law, at what particular point they should have looked. (*Greany vs Railroad Co.*, 101 N. Y., 419, 427; *Petrie vs Railroad Co.*; 66 Hun., 284.)

In *Shaw vs Jewell*, 86 N. Y., 617, it is said: "The plaintiff is not bound to see. He is bound to make all reasonable effort to see that a careful, prudent man would make in like circumstances. He is not to provide against any certain result. He is to make an effort for a result that will give safety, such an effort as caution, care and prudence will dictate."

The distance at which the deceased or driver could see the headlight of an approaching engine, under the circumstances then existing, was indefinite. There were other lights in the vicinity. If no signals were heard or given, and the wind blew briskly from the other direction, and the train came on silently, so far as they were concerned, at forty miles an hour, it should not be said, as a matter of law, that they could have seen it when they stopped, or should have seen it in time to have avoided the collision. In the *Massoth* case it is said that: "It does not necessarily follow from the fact that a skilled engineer can demonstrate that, from a given point in a highway, the track of a railroad is visible

from any distance, that an individual in charge of a team approaching the track is negligent because, from the point specified, he does not see a train approaching at great speed in time to avoid a collision."

See also *Puff vs Railroad Co.*, (71 Hun 577.) *Parsons vs Railroad Co.*, (113 N. Y., 364.)

We think that the question of contributory negligence was properly left to the jury. It follows that the judgment should be affirmed. All concur.

Judgment and order affirmed, with costs. —N. Y. Law Journal, Aug. 27, 1894.



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JUDGMENT.

Action to Set Aside Judgment of Foreclosure.

(Sixth Judicial Circuit—Ottawa County—June Term, 1894. Present; Hons. C. S. Bentley, P. J.; C. H. Scribner and G. R. Haynes, J. J.)

Jeremiah Brown, et ux., vs Geo. E. St. John, et'al. Error to the Court of Common Pleas.

(Action to set aside judgment of foreclosure and reformation of a mortgage, alleging that plaintiff, at the time the foreclosure suit was brought, did not own the mortgage and that his allegations as to the error in describing the property mortgaged were false. HELD, such allegations are insufficient. ED. LEGAL NEWS.)

SCRIBNER, J.

On the 12th of July, 1888, Jeremiah Brown, one of the plaintiffs in error, made his promissory note of that date whereby he promised to pay to the order of Geo. E. St. John \$130 in one year after date thereof, with interest at 8 per cent per annum payable annually. At the same time there was executed by the said Jeremiah Brown and his wife Mary C. Brown to the payee of the note, Geo. E. St. John, a mortgage on certain premises situated in the village of Port Clinton and described in the mortgage as lot No. 4 of block 30, as designated on the original plat of said village of Port Clinton. This mortgage was duly filed for record with the Recorder of Ottawa County, Ohio, July 16, 1888, and was regularly recorded in the mortgage records of said county.

On the 15th day of October the payee of the note, Geo. E. St. John, filed his petition in the Court of Common Pleas of Ottawa County, Ohio, against the plaintiffs here, Brown and his wife (Mary C. Brown being the wife of Jeremiah Brown) for the foreclosure of the mortgage above mentioned. In that petition the making and delivery of the mortgage were duly

set forth in the usual form of petition, containing the usual allegation that the defendant, Jeremiah Brown was indebted to Geo. E. St. John, the plaintiff in the action, upon a promissory note, which I have mentioned, in the sum of \$130 and the interest to be computed with annual rests from July 12, 1889.

The petition in foreclosure, filed by St. John, proceeds to set forth that a mistake had been made in the preparation and execution of the mortgage in this, that the makers thereof intended to convey to the plaintiff in fee simple, the following described real estate, to-wit:

"Situated in the village of Port Clinton and the County of Ottawa and State of Ohio, and known and being the south half of lots 5, 6, 7 and 8, of block 30, as designated on the original plat of the said village. Plaintiff says that by the mutual mistake of the parties or the scrivener, who drew said deed, the real estate was erroneously described as follows:

"Situated in the Village of Port Clinton State of Ohio and County of Ottawa and known as being lot No. 4 in block 30 as designated in the original plat of said village."

The petition of St. John proceeded then to set forth the condition of the mortgage and the failure to make payment according to the tenor and effect thereof of the amount due thereon, and sets out further that the defendant Cushee & Co. has some claim upon the real estate described, and it prays that they may be compelled to disclose it in this action or that they may be forever barred, "wherefore plaintiff prays judgment against Jeremiah Brown upon the said promissory note in said sum of \$130, with interest to be computed annually

from July 12, 1889, and that said deed may be so reformed as to properly describe said real estate and that said land may be sold for the payment of the liens in the order of their priority as they may be determined by the Court, and for all proper relief."

Defendant alleges in the petition filed herein (and which is now the subject of consideration) that summons was duly issued in the case brought by St. John in foreclosure and for reformation, that service was regularly made on the parties in that action, Brown and his wife (the present plaintiffs) and that judgment was rendered by the Court of Common Pleas in the case, the parties, the defendant, therein being in default.

There is a finding as to the lien of Cushee—a mechanics lien, it appears, which they had set up by cross-petition. Then the Court proceeded to render judgment requiring Jeremiah Brown and his wife to pay the amount found due within the period specified, and the interest; and also that the claim of Cushee and Co. be paid, and in default thereof that an order of sale be issued to the sheriff of the county commanding him to proceed and sell the property.

The defendants in that action, Brown and wife (the plaintiffs here) commenced this action in the Court of Common Pleas of this county on the 28th of September, 1893, asking that the judgment and the decree so rendered against them be set aside. No question is raised but that the petition was filed, as alleged, against them; process issued and served upon them (indeed they allege in their petition here that service was made upon them) nor that the decree of the Court was rendered, as stated in what I have read, which, in fact, is what is complained of in the petition. But they set up as a

ground of attack upon the proceedings of the Court, in the first place, that at the time the defendant, Geo. E. St. John, commenced said action and filed said petition he was not the owner of their said promissory note or of said mortgage and had no authority to commence said action and his entire proceedings in said case was a fraud on these plaintiffs. That is to say, although St. John filed his petition, alleged in the usual form that there was due to *him* from the defendants on a promissory note and mortgage set forth in the petition, a certain amount, yet, in point of fact, he was not the owner of their note and mortgage and therefore, he, not being the owner of the note and mortgage, and having no authority to commence the action against them, in which the decree was rendered, they allege, that his entire proceedings in the case were a fraud on these plaintiffs; and they further say that the allegations alleging a mistake in said mortgage were false, and that the said Geo. E. St. John, well knew at the time that the same were false as he set the same forth in his petition.

But we observe the allegation is that the statement of a mistake in the execution of the mortgage, as alleged in the action brought by St. John, was false, and that St. John knew them to be false; not that there was, in fact, no mistake, but that the mistake was not of the character which St. John alleged in that action.

And they say this by way of complaint against the proceedings of St. John, "Plaintiffs say that the aforesaid note and mortgage was executed and delivered to the said Geo. E. St. John, &c." (reading the whole complaint at length.)

Now all these allegations are to the effect that there was a mistake in the description of the mortgaged premises set

out in the mortgage; that the mortgage described lot No. 4 in block 30, whereas it was intended, according to these allegations, that it should embrace the north half of certain lots, which premises were owned by Brown himself, the maker of the note, and that said St. John procured the decree to be so entered as to include not only the north half of the lots which were owned by him but also the south half of the same lots, which were owned by the wife, on which it is said the home of the husband and wife is situated.

Then the plaintiffs further say in their petition here, "that St. John fraudulently concealed said facts from the plaintiffs, &c." (reading from the amended petition.)

John Lechler is made a defendant in this proceeding. Now it would seem according to the allegations of this amended petition, and the recitals from the proceedings of the Court of Common Pleas contained in it, that the action of September 1892, was commenced in regular form by St. John; that there was filed therein the usual petition necessary to effect a foreclosure of said mortgage, and setting forth that a mistake had occurred in the making of the mortgage in the description of the premises, and alleging what premises it was intended should be described. There is no question but that the mortgage was given and the note was due and unpaid or that a mistake had occurred in the drawing of the mortgage, but the controversy is as to the property intended to be included in the mortgage. The plaintiff, St. John, in his action for the reformation of the mortgage stated that the south half of certain property was intended to be covered by the instrument. The plaintiffs in this action insist that it was only the north half that was intended to be included in the mortgage. Now these parties, as they themselves

say, were regularly served with process. They had the day in Court; they made default; the journal entry and the decree of the Court recite that the case was heard not only upon the pleadings but upon the evidence, and the averments of the petition were found true and a judgment was rendered accordingly.

I may say that a demurrer to this petition was sustained in the Court of Common Pleas and the petition dismissed and the case comes up here upon error of the Court of Common Pleas to reverse the judgment so rendered by the Common Pleas Court in sustaining the demurrer and dismissing the petition. It is now stated here that St. John was not in fact the owner of this claim at the time that he brought this action. It is said that this conduct on the part of St. John was fraudulent on his part; it was a fraud for him to bring an action upon a note and mortgage, as the owner of said note and mortgage, when in point of fact he did not own them. It is not alleged who did own the note and mortgage, it is merely alleged that St. John did not own them. The Court in rendering this decree necessarily finds that St. John was the owner of the note and the security; finds that there is so much due to him thereon from the defendants and renders judgment accordingly in his behalf. In our view of the law, the mere allegation on the part of the defendants in a proceeding brought by them to open the judgment, that the defendant was not the owner at the time, is not sufficient to authorize the Court of Common Pleas to set aside this judgment. But, in that action, I may further state, it appears by the allegations in this petition that the judgment has been assigned to John Lechler. It is stated that that assignment was made and that he claims to be the owner of the judgment and threatens to enforce the same. It is

not stated anywhere in the petition that he is the owner of this judgment; it is not suggested that any other person is the owner of it or entitled to any interest in it. It is also alleged in the petition and made a ground of complaint here as a reasonable cause for setting aside the judgment below, that the claim made by St. John that the mistake occurred in misdescribing the premises in this: that the mortgage should have been upon the south half of the lots described instead of the north half, was a fraud upon the plaintiffs below. Now that depends upon the question of fact as to who was right about it. St. John alleged that it was intended that the mortgage should cover the south half of the lots. These plaintiffs insist that it was, instead, that the mortgage should cover only the north half of the lots. The decree of the Court finds and holds upon the evidence (or at least purports to find from the evidence), that the agreement and understanding was that the mortgage should be upon the south half of the lots as alleged by St. John and the decree is rendered accordingly. I cannot understand how the plaintiffs, under such circumstances, can claim fraud on the part of the plaintiff in the action in which the Court has rendered judgment upon the evidence, and in which the Court found as the plaintiffs in that action claimed, and not as the plaintiffs in the present action claim, the facts to be. The statute, Section 5354, provides, "The Common Pleas Court, or the Circuit Court, may vacate or modify its own judgment or order, after the term at which the same was made."

In the case reported in the 39 O. S. Report, page 624, it is held:—Action, by A. against B, C. and D. Judgment for defendants. Petition by A. under Civil

Code (2 S. and C. 1112) setting forth the issue in the action and alleging that the defendants entered into a conspiracy to and did testify falsely, and thereby obtained the judgment, evidence to sustain such allegations having been discovered since the trial: *Held*, that the petition is insufficient under the Civil Code of 1853, §534, subdivision 4, which authorizes the Court in which the judgment was rendered to set the same aside "for fraud practiced by the successful party in obtaining the judgment or order."

Now, in this case it is not suggested by the petition filed to set aside this judgment that the successful party practiced any fraud in the way of proving the allegations but only that the claim of the plaintiff in that action was not made by the owner of the claim and that thereby he practiced a fraud and that the statement made by him that the mortgage was intended to be given on the south part of the lots named was false, and that in making that claim the plaintiffs below practiced fraud; but it does not appear anywhere in this petition that any improper practice, any false testimony or anything improper was resorted to in order to induce the Court to render this judgment.

Sub-division 10 of 5354 reads as follows:

"When such judgment was obtained in whole or material part, by false testimony on the part of the successful party, or any witness in his behalf, which ordinary prudence could not have anticipated or guarded against, and the guilty party has been convicted."

It may not be material in the case reported in the 39 O. S.

Our conclusion is that the judgment should be affirmed.

C. I. York, for plaintiff.

E. G. Love, for defendant.

PLUGGING GAS OR OIL WELLS.

(Sixth Judicial Circuit—Ottawa County, June Term, 1894. Present: Hons. C. S. Bentley, P. J., C. H. Scribner and G. R. Haynes, J. J.)

State of Ohio, ex rel. David Gordon vs
The Oak Harbor Gas Company. Error
to Court of Common Pleas.

(1—A claim that plaintiff has no legal capacity to sue is waived by answer or demurrer, unless such answer or demurrer specifically points it out.

2—Section 5 of the act of 1893, 90th Ohio Laws, page 24, regarding the filling and plugging of oil wells, provides a penalty and its provisions must be strictly construed.

3—The petition in an action to recover a penalty, under the section above referred to, must show some act indicating that the owner or operator of the well intended to abandon the same; an allegation that "while the defendant is pretending to operate the well, it has in fact ceased to operate the same," without specifying further, is insufficient.

4—The penalty under said act has not been incurred until the CASING HAS BEEN DRAWN from the well and the owner or operator has neglected to fill and plug, or has inefficiently filled and plugged the well. ED LEGAL NEWS.)

BENTLEY, J. (Orally.)

This action was begun in the Court of Common Pleas in the name of the State of Ohio upon the complaint of David Gordon for the purpose of recovering a judgment under section 5 of the Act of 1893, the Act being upon page 24 of the 90th volume of the laws of the State of Ohio. Section 5, upon page 25, provides a penalty for the violation of this Act,—an act regarding the filling and plugging of oil wells.

A general demurrer was filed to the petition in the Court of Common Pleas, which being overruled, the defendant answered and went to trial to a jury and the jury finding in favor of the plaintiff.

This action was brought on error to reverse the judgment of the Court of Common Pleas. But the reason assigned why judgment should have been in favor of the defendant instead of the plaintiff below, is the insufficiency of the petition.

The allegations of the petition are comparatively brief and perhaps I better read it.

"The defendant is a corporation incorporated under the laws of the State of Ohio. The defendant, for several years last past, has been operating on a certain well, constructed for the purpose of producing petroleum oil and natural gas, the same being situated on a parcel of land described as follows, to-wit, describing the land."

"The defendant claims to be the owner of said well &c." reading at length.

Section 2, under which it is presumed this petition is sought to be drawn reads as follows:—

"That the owner or operator of any well constructed for either or any of the purposes named in the first section of this act, when about to abandon or cease operating the same, and before drawing the casing therefrom, shall securely fill such well with rock sediment, or with mortar composed of two parts sand and one (1) part cement to the depth of two hundred (200) feet above the top of the first oil or gas bearing rock, in such manner as shall prevent the surface or fresh water from penetrating to the oil or gas bearing rock, and also as shall prevent the gas and oil from escaping therefrom. If the owner or operator of any such well shall fail to or shall inefficiently comply with the provisions of this section, then the owner of the land upon which such well is situated shall forthwith comply therewith. If all the persons hereinbefore named shall fail to or shall inefficiently fill such well in the manner hereinbefore described, then it shall be lawful for any person, after written demand therefor to any of said persons, to enter the premises where such well is situated, take possession thereof

and fully comply with the provisions of this section. The reasonable cost and expense thereof shall forthwith be paid by the owner or operator of the well, and on his default by the owner of the land. The amount of such reasonable cost and expense shall forthwith be a lien upon the fixtures and machinery and leasehold interest of the owner and operator of said well, as well as upon the title and interest of the land owner in the land upon which said well is situated, and may be recovered or enforced against said owner or operator and said land owner in the order named, in any Court of competent jurisdiction."

Omitting Sections three and four, section five provides:—

"That any person, co-partnership or corporation violating any of the provisions of this act shall be liable to a penalty of one hundred dollars, to be recovered with costs of suit in a civil action in the name of the State of Ohio, in any Court of competent jurisdiction in the county in which the act shall have been committed or omitted. Such suit may be brought at the instance of any resident of the State of Ohio without security or liability for costs. The amount of said penalty when collected shall be paid one-half into the school fund of the county in which said suit is brought, and one-half to said person at whose instance said suit shall have been brought."

Presumably, upon this section 5, this action, as here brought, is sought to be maintained. It is brought, as will appear, in the name of the State upon complaint of one, Gordon. The statute provides that such an action may be brought in the name of the state upon a complaint of a resident of the county. In this petition it does not appear that Mr. Gordon is a

resident of the county, nor where he resides, nor who he is, but only a general demurrer to the petition is urged. It is probable that the specific objection which might be made to this petition, by reason of this failure to allege that the name of the state is used upon complaint of a resident of a county as provided, goes to the legal capacity of the plaintiff to maintain this suit, for the defendant's objection to it must be taken either by demurrer or by answer specifically calling attention to the defect and relying upon it.

The code provides that unless a demurrer shall particularize, it shall be considered simply as a general demurrer to the petition, as setting up no cause of action against the defendant, and there is also a provision that where the objection that the plaintiff has no legal capacity to sue is not taken either by answer or demurrer, it shall be taken as waived and if this objection is properly considered as founded upon the claim that the plaintiff has no legal capacity to sue, it has been waived by failure to specifically point it out.

In fact, this objection was not mentioned in the argument before us, and was not urged in any way; the main complaint, however, is that the petition does not state facts sufficient to constitute a cause of action against the defendant in any way. If this were so, no matter what the proofs might have been below, the judgment ought to be held erroneous. This statute provides for a penalty and its provisions must be strictly construed.

Under the general rules of construction, the defendant is not to be held liable, unless under the statute as it should be construed, he has violated its provisions and incurred the penalty prescribed by that act. I have read the first section of that act because we think it bears largely up-

on the construction to be given to the second section.

This petition, in general terms, avers that this party is the operator of the well. It does not appear that it drilled the well. The well might have been fully completed before it became, in any manner, interested in it; so that, although the petition alleges that the surface water—the fresh water—does penetrate the oil and gas bearing rock through the well, and alleges that the well is in such a condition that it will do that, yet it does not allege that it is by reason of a failure to properly case it up as provided in the first section of the act. The casing is to be put in by the owner or operator and before the oil bearing rock, has been reached,—while the well is, in fact, being drilled.

But the penalty is said to have been incurred because, as the petition alleges, "That while the defendant is pretending to operate the well, it has in fact, ceased to operate the same." That at the time of the filing of the petition the defendant "has ceased actually to operate the well." The petition does not allege when it ceased, or that it has ceased at any time prior to the actual time of filing or preparing the petition. Whether it ceased that day or ceased the day before, or had ceased for a long time to operate the well, does not appear from the averments of the petition.

In making this statement I do not forget the allegation of the petition which says, "That ever since the first day of April, 1893, it (the defendant) has unlawfully and willfully neglected and omitted to securely fill said well with rock sediment." That is not an allegation that on or prior to the first day of April, 1893, it had ceased to operate the well, or that prior to that time it was about to

cease to operate or abandon the well; so that, from the allegations of the petition it may be that on the very day on which this petition was filed the operating of the well ceased.

It is contended by the plaintiff in error, that in fact no penalty is incurred or can be incurred under this second section until the casing has been drawn from the well; on the other hand, the relator contends that the circumstances determine whether the well should be filled or not, and that although the filling should have preceded the drawing of the casing, the penalty is incurred at any time when a duty arose to fill the well, as provided in the second section, and that duty was not performed.

The time prescribed when this should be done, is when the owner or operator "is about to abandon or cease operating the same and before drawing the casing therefrom." Now, it will appear very clear that while the statute provides that the duty is to do this filling when about to abandon the well, it could not (or, at least, very seldom) be shown before the casing had been drawn, that the time had arrived when the penalty had been incurred. "When about to abandon a well" is simply an expression indicating the state of the mind of the owner or operator at the time, when he was about to do it; i. e., when he intended in the near future to cease operating and to abandon the well, but until he had performed some act it would be exceedingly difficult, in any case, to show that the time had come when he had, in fact, violated the statute since intention without an act is not to be punished.

There must be another time fixed. That being one point of time for the beginning of the scrutiny of his intention and con-

duct, there must be a subsequent time or event fixed by the statute when this filling of the well should be accomplished, and the statute does not fix that in any way. unless it does so inferentially by this clause "before drawing the casing therefrom." If that does not fix the time when the act must have been accomplished, then the time is not fixed at all, and it is left entirely indefinite and is a matter pertaining simply to the mind or intention of the owner or operator of the well.

It will be seen by a scrutiny of that section what the mischief is which is to be provided against, viz., "that surface or fresh water shall not finally penetrate the oil or gas bearing rocks." That mischief is guarded against in the first section of the act by the provision that when the well is being constructed and before this rock is reached it shall be so cased with iron casing as to prevent the fresh water from penetrating the oil bearing rock. If then the first section of the statute can be complied with and is complied with, it would be impossible as long as the casing remains that that mischief should happen; so that, considering what is provided in the first section, it seems even more clear than otherwise it would, that by the second section it was intended or presumed by the legislature that as long as the casing remained and it effectually accomplished its purpose, the object of the act would be accomplished and the penalty under the second section not incurred.

Now it may be true, and personally I happen to know that it is true, that although casing may be placed in a well, properly and securely in the first instance, so that the water is shut off from the low-

er strata of rocks, yet in process of time it becomes imperfect from various causes.

It may be that the pressure from above will force water under the end of the casing, although tight in the first place, into the well; it may be that the casing itself will collapse, or it may be that it will corrode or rot away, or some imperfection appear in it, by reason of which the surface water is allowed to get into the well; but all that is simply accidental personal knowledge, and, practically, nothing of it appears in the case. And whether it did or did not we must take the provisions of the statute as they are, and from them it would appear that the Legislature has assumed, as I have said that when the first section is complied with, it will prevent this mischief and there is no provision yet as to what shall be done if while the well is being operated and before it is abandoned, anything should happen to the casing so that it did not prevent the water from getting down into the well.

The construction which we put upon this statute has not been arrived at without considering the latter part of section 2, which provides in substance, that in case the owner or operator does not fill the well, as provided in the first part of the section, then the land owner shall comply with this section, and if he does not comply with it, or ineffectually complies with it, though he attempts to comply with it, then some other person may comply with that section.

The section is not very carefully drawn, as would appear from these provisions, because, this being a work that should be done when the owner or operator is about to discontinue operating the well, if he does not do it, but draws the casing and thus incurs the penalty, of course it

would be impossible, in the fullest sense of the term, for any person thereafter to fully comply with the statute, since the filling must be done before the casing is drawn. But that results from a hasty drawing of the statute or want of care in preparation, and while it is to be considered, and while we have considered it, in determining the true construction of the first part of section 2, yet it is not sufficient to indicate that the construction we give it is not the correct one.

Now, it does not appear from this petition that the casing has ever been pulled and therefore, under the construction of the statute which we feel bound to give, this penalty was never incurred; that is, it does not appear that it was in fact incurred, and for these reasons we think the Court of Common Pleas committed an error, in the first place, in overruling the demurrer and that there was error afterwards in sustaining the verdict of the jury and in refusing a new trial because of a lack of proper averment to show that the penalty under this statute, in fact, incurred by the defendant.

The judgment of the Court of Common Pleas, therefore, in this case will be reversed, the verdict set aside, and the case will be remanded to the Court of Common Pleas for such further proceedings as may be authorized by law. The judgment for the costs on error will be awarded against the defendant in error.

C. I. York, for plaintiff.

T. J. Moorshall, for defendant.

APPEAL AND ERROR.

Bill of Exceptions Upon Hearing or Order at Chambers.

(Sixth Judicial Circuit, Erie County. May Term, 1894. Present, Hons. C. S. Bentley, P. J.; C. H. Scribner and G. R. Haynes, J. J.)

SCRIBNER, J. (orally.)

On the 5th of March, 1894, Marshall Field & Company brought an action in replevin in the Court of Common Pleas of Erie County against certain parties doing business under the name of John J. and George A. Esch, and say therein that they are entitled to the possession of certain goods and chattels consisting of merchandise described in the petition, and that the defendants wrongfully detain the goods in question from the possession of the plaintiffs.

A writ of replevin was issued in due form and the goods seized, but they were re-delivered to the defendants in virtue of section 5820 of the Revised Statutes as amended April 3rd, 1891; the property to be retained by the defendants until the determination of the action. On the 8th day of March, 1894, two days after the commencement of the action, the plaintiffs filed a supplemental petition in which they set forth the seizure of the property in question and its re-delivery to the defendants upon their giving the bond provided for by the statute, but they alleged that contrary to the conditions of their said bond and the requirements of the law aforesaid, said defendants are threatening to sell, and are about to sell the property so replevied and have advertised to sell the same, commencing on the 10th day of March, contrary to the provisions and requirements of the statute and the condition of said bond. The

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plaintiffs further aver that it is their right to elect at the determination of the case, should the judgment be in their favor, whether they will take the goods or their value in money; and they also set forth certain matters entitling them as they claim to equitable relief. They pray that an order of injunction may be granted against the defendants, restraining them from selling or parting with the goods pending the determination of the action. Upon the same day the Probate Judge of Erie County allowed a temporary injunction as prayed in the petition, upon the giving of a bond in the sum of \$200 by the plaintiffs in the action in conformity with the statute, and in compliance with this requirement a bond was given.

Afterwards, the parties appeared before a Judge of the Court of Common Pleas of this sub-district at chambers, and a motion of the defendants in the action to dissolve the temporary injunction which had been allowed by the Judge of the Probate Court, was granted and the injunction was dissolved. The Judge, upon making the order of dissolution granted 50 days to the plaintiffs in the action within which to prepare and file a bill of exceptions. The journal entry of the action of the Judge also shows that the defendants gave notice of their intention to appeal from the order of the Court dissolving the injunction to the Circuit Court and fixed the bond at \$200. This bond was given in conformity with the order as made by the Judge and a transcript of the journal entries showing this action of the Judge at chambers was filed in this Court, also a certified copy of the bond given for the appeal.

Afterwards, as appears by another certified copy from the journal of the Court

of Common Pleas, the case was further heard upon the demurrer to the supplemental petition which was filed and upon which the injunction was allowed by the Probate Judge, which was journalized as follows:

"This day this cause came on for hearing upon the demurrer of the defendants filed March 31st, 1894, to the supplemental petition of the plaintiffs, and was argued by counsel, and the Court being fully advised as to the law in the premises does sustain the same, and plaintiffs not desiring to plead further in regard to the matters set forth in said supplemental petition, it is ordered by the Court that plaintiffs' said pleading denominated 'amendment to and supplemental petition' be and the same is hereby dismissed at the plaintiffs' costs who are ordered to pay the same, to which ruling of the Court in that behalf in sustaining said demurrer and dismissing said 'amendment to and supplemental petition' the plaintiffs then and there duly excepted, and thereupon plaintiffs also gave notice of appeal to the Circuit Court of Erie County, Ohio, and the Court thereupon fixed the amount of the bond to be given by plaintiffs for such appeal at the sum of one hundred dollars."

The bond appears to have been given in due form as required by the statute. There is a motion by the defendants in the action to dismiss this appeal, and we think that motion must be overruled. The supplemental petition we regard as properly filed, as equitable in its nature, praying for equitable relief, and entitles the parties to be heard upon the allegations which they make. The motion of the defendants to dismiss the appeal taken from the order of the Court

dismissing the petition is overruled, and the case will stand for trial.

It further appears that on the hearing of the motion to dissolve the injunction at chambers before the Judge of the Court of Common Pleas a bill of exceptions was allowed and taken; also, that there is an appeal to this Court by the plaintiffs from the order made at chambers dissolving the injunction; and there is also a petition in error filed with the bill of exceptions by which it is sought to reverse the order of the Judge made at chambers dissolving the injunction.

It has been decided by the Supreme Court that in a case of this character a Judge has no authority to allow or sign a bill of exceptions upon a hearing or order made by him at chambers. I am not certain whether this ruling was reported, but we are familiar with it and know it was made. The Circuit Court of Defiance County made an order disregarding a bill of exceptions so taken, and that decision is reported in the Circuit Court reports. The case was taken to the Supreme Court and the judgment of the Circuit Court was affirmed. So that we cannot regard this bill of exceptions taken upon the hearing of the motion at chambers to dissolve the injunction as of any avail.

There is also united with the proceeding in error which I have mentioned a proceeding to reverse the order and judgment of the Court of Common Pleas dismissing the amended or supplemental petition. The petition in error joins in one proceeding copies of the order of the judge dissolving the injunction at chambers, and also the judgment of the Court sustaining the demurrer to the supplemental or amended petition, and dismissing that petition. But inasmuch as in our judgment the appeal taken from that

judgment of the Court brings that case into this Court, it follows that the petition in error must fall, because if the appeal is properly taken and perfected here, there is no judgment of the Court of Common Pleas to reverse on petition in error.

From these views it results that the case now stands in this Court as it did in the Court of Common Pleas. The appeal from the judgment of the Court brings up the case, so that really there is nothing here to try except the cause of action set forth in the amended or supplemental petition, by which these plaintiffs enjoined the defendants from selling the goods seized pending the action of replevin. The action of replevin remains in the Court of Common Pleas. It follows therefore that the appeal from the order of the Judge of the Court of Common Pleas made at chambers must be dismissed and the petition in error must also be dismissed. The motion to dismiss the appeal from the judgment of the Court of Common Pleas will be overruled.

Phinney & Merrill for plaintiffs.

King & Hull and H. L. Peeke, for defendants.

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OFFICIAL LAW JOURNAL OF LUCAS
COUNTY, OHIO.

In the matter of the designation of a daily Law Journal in Lucas County. As required by Sec. 1 of an Act passed April 14th, 1884 and amended Feb'y 25, 1886, entitled "An Act relating to the posting of court calendars and legal notices in certain counties," as amended May 12, 1884, the Judges of the Courts of Record in said County other than the Circuit Court, hereby jointly designate the TOLEDO LEGAL NEWS, a daily law journal published in said County, as the journal wherein until the further order of said judges, shall be published all the notices, advertisements, abstracts and matters and things specified or referred to in said Section 1.

Approved { HUBERT HARMON,
REUBEN C. LEMMON,
ISAAC P. PUGSLEY,
Judges of Common Pleas,
I. I. MILLARD, Probate Judge.

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SATURDAY, SEPT. 8, 1894.

Set-off against judgments in the hands of an assignee is upheld in *Benson vs Haywood*, 23 L. R. A. 335, and the general subject is presented in a note to the case.

There has been some delay in the preparation of our Legal Directory, and it is not completed yet, though the names for which copy has been received are published in this number.

The claim that the common council of a city has inherent power to remove a city counselor who is appointed by the mayor for a definite term is denied by the Supreme Court of Michigan, in *Speed vs. Detroit*, 22 L. R. A. 842.

The constitutionality of Sunday laws has been recently considered in the Michigan case of *People vs. Bellett*, 22 L. R. A. 696, and the Maryland case of *Judefind vs. State*, 22 L. R. A. 721, both of which uphold the laws. In a note to the Maryland case, it is shown that the former de-

cision on the subject, with the exception of one or two early cases, which have been overruled, are unanimous in supporting the constitutionality of the laws.

The power of an assignee for creditors to compromise claims is upheld in the North Carolina case of *Loucheimer, Mann & Co. vs. Weil*, 23 L. R. A. 578, and the existence and extent of this power is examined in the annotation to the case.

The liability of a railroad company formed by consolidation to pay the obligations of its predecessors is upheld in *Chicago & I. C. R. Co. vs. Hall* (Ind.) 23 L. R. A. 231, and a note to the case shows that many other decisions are to the same effect.

The refusal of the court to accept a verdict in a murder case because not in proper form, and its correction by the jury, are upheld in *Grant vs. State*, 23 L. R. A. 723, with which is a note of great length on the correction of a verdict in criminal cases.

The personal liability of a member of a mutual benefit society to an action for an assessment is established in the Missouri case of *Ellerbe vs. Barney*, 23 L. R. A. 435, and a note to the case shows that the few prior decisions on the subject are generally to the same effect.

That a trademark cannot be claimed in the words "Sarsaparilla and Iron" used for a medicinal compound or beverage, is decided in *Schmidt vs. Brieg*, 22 L. R. A. 790, which decides, nevertheless, that a palpable imitation of a label on which such words are used will constitute an infringement.

That a statute making illegitimate children capable "of inheriting and transmitting an inheritance on the part of or to the mother" does not permit collateral relatives of the mother to derive the estate through her is decided in the Kentucky case of *Croan vs. Phelps*, 23 L. R. A. 753. The whole subject of inheritance by, through or from illegit-

imates is treated in a note to the case. It is a noticeable fact that the rights of such children have in modern times been greatly enlarged by statute.

The right of a newsboy to recover damages for injuries received on a passenger elevator is denied in *Springer vs. Byram* (Ind.) 23 L. R. A. 244, where the rules of the establishment excluded newsboys from the elevator, and the boy had notice of the rule.

A gratuitous promise by the cashier of a national bank to accept a draft on a depositor is held in *Flannagan vs. California Nat. Bank*, 23 L. R. A. 834, to be void as exceeding the powers of the bank. The annotation to the case is on the power of the bank to be an accommodation indorser.

The effect of a divorce on rights of homestead is considered in *Rosholt vs. Mehus*, (N. D.) 23 L. R. A. 239, in which the homestead is held to remain in possession of the party holding the legal title, if the divorce decree is silent upon the question. A note to the case presents the other decisions on the question.

The right to attach a mere possibility, such as the right to a fee in case of surviving another person, is denied in *Young vs. Young*, 23 L. R. A. 642, and there is an extensive note to the case on the question what expectant and contingent interests in real property are subject to attachment or levy on execution.

Some exceedingly practical and important questions of set-off are elaborately considered in one of the parts of volume 23, *Lawyers' Reports, Annotated*. The Michigan case of *Bradley vs. Thompson Smith's Sons*, 23 L. R. A. 305, denies a set off between a claim not due at the time of the debtor's assignment of an executory contract and claims afterwards arising on the contract. The annotation, reviewing numerous cases, shows the general rule of set-off between the assignee of a chose in action and pre-existing demands against the assignor together with the limitations to the rule.

U. S. Circuit Court.

Northern District of Ohio—Western Division.

Filings.

1182—*Farmers L. & T Co. vs T A A & N M Ry Co.* Petn and order to take testimony. Cowles & Jerome, solrs.

1205—*Continental Tr Co vs T St L & K C.* Receiver's report May 22 to Aug 31-94.

1233—*Newman Erb trustee vs The T & O C R R Co. and T & O C Extn R R Co.* Petn and praecipe. Action, to recover \$22,500 int on bonds of extension guaranteed by T & O C Ry Co. Nye & Follett, attys.

1233—*Same.* Appearance of T & O C extn R R Co.

U. S. District Court.

In Admiralty.

178—*A. Gilmore vs schooner Mineral State.* Int libel of J P Brogan. Supplies \$104.82. Goulder & Holding, proctors.

178—*The Vessel Owners' Towing Assn vs same.* Libel \$217.30. Same Proctors.

178—*Gilmore vs Same.* Int. libel. The Upson Walton Co. supplies, \$76.58. Same Proctors.

178—*Same vs same.* Int. libel. F. R. Saegers, \$39.38. Same Proctors.

178—*Same.* Int. libel for towing vessel Owners Towing Co. \$62. Same Proctors.

178—*Same.* Int. libel M. A. Bradley. Towing \$75. Same Proctors.

178—*Same.* Int. libel Wm S. Mack. \$50. Same Proctors.

178—*Same.* Int. libel D. J. Nelligan, supplies, \$35.90. Same Proctors.

178—*Same.* Int libel for Thos Murphy & Wm J. Miller \$730.42. Wm H. Miller, proctor.

178—*Same.* Stipulation for costs on behalf Thos Murphv.

—*McKerrick et al vs Steamer Dove.* The following libels for seamen's wages were filed yesterday: Wm McKerrick \$27, R. J. McConville \$31.94, Napoleon Carson \$32.83, Joseph Moran \$8.20, George Jonau \$4, Albert Bush \$10.06, Jno VanDepitte \$23.25, Charles Schulz \$20.25 F. W. Rickenbaugh, proctor.

DAMAGES TO EASEMENTS,**Apartment House Partly Abutting on Elevated Railroad.**

(Supreme Court of New York, General Term, First Department, June, 1894. Present: Hons. Charles H. Van Brunt, P. J.; Alton B. Parker and George C. Barrett, J. J.)

Sara J. Keene, respondent, vs The Metropolitan Elevated Railway Company et al., appellants. Appeal from judgment entered after trial at Special Term.

B. Tolles, for appellants.

J. A. Murray, for respondent.

VAN BRUNT, P. J.

This action was brought to obtain an injunction against the operation of defendants' railroad or the payment of damages because of the interference with easements in the street in front of the plaintiff's premises. The premises in question are situated at the southwest corner of Ninth avenue and Fifty-seventh street, having a frontage on the avenue of 125 feet and on the street of 100 feet. The defendants have constructed and maintained and are operating an elevated railroad on Ninth avenue. The building upon the premises in question was constructed in 1880 and 1881, and was intended for use and is now used as an apartment house. The building is divided into five distinct and unconnected apartments on each floor, except the first and eighth floor. These apartments are parallel with Ninth avenue, except one which fronts on Ninth avenue and runs across the rear of the other apartments. The apartment at the corner of Ninth avenue and Fifty-seventh street and the apartment fronting on Ninth avenue in the rear of the other apartment are the only ones fronting on Ninth avenue. In the award made in

this action damages were allowed for alleged injuries to the apartments which had no frontage on Ninth avenue as well as to the two which had such frontage; and the question presented upon this appeal is whether such an allowance can be justified.

It seems to us that it cannot. The three apartments which fronted on Fifty-seventh street had no easements of light, air and access upon Ninth avenue. While damages have been allowed where premises are so situated that they are to be considered as a single parcel, although the total frontage might not be upon the street occupied by the elevated railway, yet, where such premises are improved by buildings distinct within themselves, some of them having no frontage upon the avenue occupied by the railroad, it is difficult to see upon what theory an award for the destruction of easements upon the avenue upon which such buildings have no frontage can be predicated. In the case at bar the three apartments have no frontage upon Ninth avenue, the street occupied by the railroad. They, therefore, can have no easement in the light, air and access upon such avenue, as such easements have been held to belong to the abutting owner. The apartments in question, therefore, do not seem to come within the class to which relief has been granted in actions of this character.

It has been urged that because of the fact of there being unity of construction in the building and unity of ownership, a different rule should obtain. But it is apparent that, notwithstanding the unity of construction and unity of ownership, these premises are occupied as distinct and separate buildings, just as much as though there was no architectural unity

and there was a division of ownership. It is difficult to see how mere architectural unity or single ownership can give an easement upon a street, where none would exist even if the occupation was the same and the interior arrangements were the same, but the external appearance showed diversity.

We think, therefore, under the findings of the learned court at special term, that the apartments fronting upon Fifty-seventh Street had no right to enter into the consideration of a recovery.

The judgment should be reversed and a new trial ordered, with costs to appellant to abide the event.

PARKER and BARRET, JJ. concur.—(N. Y. Law Journal, Sept. 1, 1894.)

As between dividendes due from the receiver of a corporation and a claim against the stockholder, set-off was allowed in *Merrill vs. Cape Ann Granite Co.* 23 L. R. A. 313, and extensive annotation shows the general rule in favor of set-off against receivers and assignees for creditors, with its limitations, including matters as to immature and contingent claims and commercial paper.

The general subject of set-off against commercial paper is illustrated in the case of *Vann vs Marbury*, 23 L. R. A. 325, and the lack of uniformity of the decisions on this subject is shown in the annotation to the case.

So many instances have occurred in recent years of a dead-lock between houses of the legislature, or of conflict between the legislative and executive department, that decisions defining the relative powers of governor and legislature have become very important. In *People, Richardson, vs. Henderson*, 22 L. R. A. 751, the Supreme Court of Wyoming decides that the appointment by the governor of an officer to fill a vacancy "until after the next meeting of the legislature" continues after the legislature meets until a successor to such office is chosen, and that the meeting of the legislature does not create another vacancy.

ERRONEOUS VERDICTS.

(Butler County Common Pleas Court.)

Andrew Wertz vs. The C. H. & D. R. R. Co.

1. Affidavits of jurors cannot be received to impeach their verdict by showing misconduct of jurors while engaged in their deliberations, nor for the purpose of proving bad motives or fraudulent conduct of jurors in relation to the cause on trial.

2. But such affidavits are admissible to show that the verdict as received and entered of record, by reason of a mistake in drawing it, or of a mistake made in open court when it is received, does not embody the true findings of the jury.

3. A verdict cannot be amended by the court on motion, on the affidavits of jurors made after they have been discharged and showing such mistake.

4. When a mistake is clearly proven, it is the duty of the court to set the verdict aside and order a new trial.

5. This may be done on the motion to amend the verdict, and without a separate motion for a new trial on file.

VAN PELT, J.

At the May term, 1890, this cause was tried to a jury. After deliberation the jury returned into court, and being asked if they had agreed upon a verdict, the foreman replied that they had, and handed to the clerk a paper purporting to be such verdict, in the words and figures following, to-wit: "We the jury, upon the issues joined between the parties in this case, do find for the plaintiff and assess his damages at twenty-two and fifty dollars (\$22.50.)

JACOB STILLBAUGH, Foreman."

The clerk opened and read the verdict, reading the amount "Twenty-two hundred and fifty dollars." The court then inquired of the jury if the verdict as read by the clerk was their verdict, and each and all of the jurors assented to the verdict as read, in the presence of the court and bystanders. Thereupon the jury were discharged and separated. On the morning of the next day it was first discovered by the clerk that the verdict did not read "twenty-two hundred and fifty dollars," but "twenty-two

and fifty dollars." and that a dot appeared between the figures 22 and 50, so that while the written portion of the verdict was ambiguous, the figures seemed to make it a verdict for only \$22.50. Upon the discovery of this fact the plaintiff at once filed a motion to reform or correct the verdict so that the same should read "Twenty-two hundred and fifty dollars (\$2250);" and on the next day, being the second day after the return of the verdict, the plaintiff also filed a motion for a new trial assigning the alleged mistake in the verdict as one of the grounds of said motion. In support of the motion to correct the verdict plaintiff filed the separate affidavits of each and all of the twelve jurors, and his own affidavit as to what occurred when the verdict was returned into court. In opposition the defendant filed the affidavit of the clerk. These affidavits were all the evidence offered upon the motion. This motion was heard and considered by the court (Judge Vanderver then presiding) at the same term, and sustained, and an order was entered directing that the verdict be reformed and corrected so as to stand as a verdict for "twenty-two hundred and fifty dollars (\$2250)." To this order defendant excepted. The motion to correct having been sustained, plaintiff withdrew his motion for a new trial. The defendant had also filed a motion for a new trial, and when the order was made correcting the verdict, defendant's motion for a new trial was overruled, and judgment entered for \$2250. Defendant having taken a bill of exceptions filed a petition in error in the Circuit Court assigning as one of the grounds of the petition that the Court erred in ordering the verdict to be amended. The case was heard at the April term

1891, and the Court held that the Common Pleas had erred in ordering said amendment, and ordered that the judgment which had been entered on the amended verdict be set aside. That Court, however, made no order setting aside the verdict, nor directing a new trial; but simply remanded the case to this Court for further proceedings. Thereupon defendant filed its motion in this Court asking that judgment be entered on said verdict for the sum of \$22.50. This motion is resisted by the plaintiff. In opposition thereto plaintiff has offered again the affidavits used in evidence on the former motion. These affidavits clearly prove the following facts:—1. That the actual sum agreed upon by the jury as their finding was \$2,250. and not \$22.50. 2. That they directed their clerk to prepare a verdict for \$2,250, and believed that he had done so. 3. That the foreman signed the paper believing it to be a verdict for that sum. 4. That when the verdict was handed to the clerk in open Court, he read it as calling for the amount. 5. That as thus read and understood, it was assented to by the jury, and received by the Court. 6. That the mistake in writing and receiving the verdict was not discovered until the jury had separated, and not in fact until the next day. Defendant objects to the competency of these affidavits.

The first question of law which arises is,—Are the affidavits of the jurors admissible to prove the mistake which occurred in writing the verdict, and the mistake of the clerk in reading it when it was returned into Court and received?

In the case of *Jackson vs Dickinson* 15 Johns. 309 (8 Am. D. 236.) the testimony of the jurors was received to prove, that

by mistake, the verdict was incorrectly entered, and was not the verdict in fact found. The Court say: "That the jurors have dep. sed must be noticed by the Court, because their affidavits are not as to what transpired while deliberating on their verdict, but as to what took place in open Court in returning their verdict, and shows that the clerk made a mistake in entering, or the Court in directing a different verdict. The information afforded by the affidavits of the jurors is not to impeach, but to support the verdict really given by them."

In *Little vs Larrabee*, 2 *Greenl.*, 37 (11 Am. D. 43), the verdict had been received and recorded, and the jury separated. But a joint affidavit was made by the jurors, that they misunderstood the legal terms used in their verdict, and that their intention was to return a verdict for the tenant; and that they erroneously supposed that to be the effect of the words used. The tenant's counsel moved to amend the verdict according to the facts. The Court held that this could not be done as the jury had been discharged; but ordered that the verdict be set aside and a new trial had. In *Roberts vs Hughes*, 7 *M. & W.*, 399, it was held that affidavits of jurors as to what took place in open Court on the delivery of their verdict, were receivable to prove that this verdict was entered for the plaintiff by mistake, and a new trial was ordered. In *Cogan vs Elsdon*, 1 *Burr.*, 383, where the issue was as to two rights of way under which the defendant justified, the jury found for the defendant as to one and for the plaintiff as to the other, but returned a verdict for the defendant as to both, and separated. This verdict was corrected on the affidavits of eight of the jurors, the foreman refusing to make an affidavit.

Prussell vs Knowles, 4 *How. (Miss.)* 90,

was an action of trespass against several defendants. The jury returned a general verdict against all of them and left the court room. *Held*, it was competent for them on returning immediately into Court to show that the verdict had been given through mistake, and to correct it by finding against some of the defendants only. The Court say: "It has never been held to be repugnant to the principles or policy of the rule to permit the jury to fortify and sustain their verdict or to show by affidavits the verdict which they really did find." The case of *Dalrymple vs Williams* 63 *N. Y.*, 861, (20 *Am. R.* 544) is an important and instructive case on the question of amending verdicts on the affidavits of jurors. And while it goes beyond what seems to be the weight of authority, in permitting a verdict to be amended on such affidavits after the jurors have separated, yet it is clearly in line with the authorities in holding that such testimony is admissible to prove a mistake in delivering the verdict. The weight of authority is that a verdict cannot be amended on the affidavits of jurors after they have been discharged. *Walters vs Jenkins* 16 *Seng & R.*, 414 (46 *Am. D.*, 585); *Seith vs Alison* 8 *Ga.* 201 (52 *Am. D.*, 393); *Wood vs McGuire* 17 *Ga.* 361 (63 *Am. D.*, 246); *Riggs vs Cook* 4 *Gilman (Ill.)* 336 (46 *Am. D.*, 462); *Reitenbaugh vs Ludwick* 31 *Pa. St.*, 131; *Sargeant vs State* 11 *Ohio* 472, and *Little vs Larrabee*, *supra*. In *Dalrymple vs Williams*, *supra*, the foreman of the jury announced a verdict different from that agreed to by the jury, and the verdict was recorded. *Held*, That affidavits of the jurors were competent evidence to prove the mistake. This case was followed and approved by the U. S. C. Ct. for the Eastern Div. of N. J. in the case

of *Burlingame vs R. R. Co* 23 Fed. Repr. 706

In the case of *Johnson vs Davenport* 3 J. J. Marsh. 390, the court held that the testimony of jurors was competent to invalidate their verdict, on the ground of mistake, when it did not subject the jury to any imputation of impure motives or palpable impropriety of conduct. This I conceive to be the true rule. While the policy of the law will not permit a verdict to be impeached by the affidavits of jurors when the object of such affidavits is to prove misconduct of the jurors while engaged in their deliberations in the jury room, nor for the purpose of showing impure motives or fraudulent or improper conduct of members of the jury; yet such affidavits are clearly admissible to show that the verdict as in fact received and entered, by reason of a mistake in drawing it, or by reason of a mistake in open court when the verdict is received, does not embody the true finding of the jury. Such testimony is not in any sense testimony impeaching the verdict. "It upholds the real verdict, and prevents miscarriage in its delivery to the court." The court is therefore of opinion that the affidavits of the jurors are admissible in evidence on the motion, and they, together with the affidavits of the plaintiff and the clerk, show beyond all doubt that the verdict as recorded is incorrect, and how the mistake occurred, and what the true finding was.

The next question is what should now be done in the premises. While there is quite a conflict in the authorities as to the power of the court to amend a verdict, in a matter of substance, after the jury has been discharged, yet the Circuit Court, following the weight of authority,

and what seems to be the better reason, held in this case that the verdict could not be amended. And it is claimed that inasmuch as the plaintiff when his motion to amend was sustained, withdrew his motion for a new trial, that he has now no standing in this Court, and that there is nothing now for the Court to do, but to enter judgment upon this mistaken and incorrect verdict as recorded. As this would be a plain and gross injustice, the Court would hesitate long before concluding that it is powerless to act, or to protect itself as well as the plaintiff against a palpable miscarriage of justice. As was said by the Court in *Clark vs Lamb*, 8 Pick. 415 (19 Am. D. 332), "in all proceedings mistakes will occur, notwithstanding all ordinary care, and when they thus happen they ought if possible to be corrected without injury to either party. The course of practice adopted by the Courts was founded on this principle." In *Eddomes vs Hopkins*, 1 Dougl. 361, Justice Buller said that where a general verdict had been rendered on a declaration consisting of different counts, some of which were inconsistent or bad in law, that the only proper remedy was to award a venire de novo. In the case of *Little vs Larrabee*, *supra*, the Court held that instead of attempting to correct the verdict and make it conformable to the intentions of the jury as explained by them after it had been received, the trial Court should have set it aside, and granted a new trial, and it was so ordered. In that case there was, as it appears, *no motion for a new trial*. There was only the motion to amend the verdict. And the Court while holding that this motion should be overruled, ordered that a new trial be granted on the ground of mistake. In *Dalrymple vs Williams*,

supra, an application was made to show cause why the verdict should not be corrected to conform to the true finding of the jury. The Court in the opinion, in speaking of the competency of the affidavits of jurors says, "If they were properly before the Court, the fact alleged was clearly established and is uncontradicted, and in addition we have the fact that the judge at the Circuit was satisfied of the mistake, and that the defendant was entitled to the correction asked, else he would have denied the motion altogether or *modified the relief demanded by granting a new trial*. It was competent to give relief in either form, and had the judge doubted as to the right or equities of the case, he would have only set the verdict aside and put the parties to a new trial." And it seems that the weight of authority is that the latter is the proper course to pursue, although the mistake may be clearly proven, if it is not discovered until after the jurors have separated.

Now in this case the motion to amend is still before the court. The relief demanded cannot under the holding of the court and of the Circuit Court in this case be granted; but this court can "modify the relief demanded by granting a new trial," and sending the case to a new jury. Such relief is plainly within the scope of this motion and the fact that the separate motion for a new trial was withdrawn has not left the court powerless to administer justice between these parties. And in the language of the concluding part of the opinion in *Little vs Larrabee* "it is to be regretted that such a mistake should have been made in the present cause, and that its consequences should be so serious and embarrassing to the parties. But the

law is such that we cannot do anything more than set aside the verdict and grant a new trial, and under the circumstances before us we ought not to do less." It is therefore ordered:—

First—That the motion to enter judgment on the verdict for \$22.50 be overruled;

Second—That the motion to amend the verdict be overruled; and

Third—That the verdict as recorded be set aside and a new trial granted.

Note—This decision was affirmed by the Circuit Court.

A peculiar contract to give one-half of the crop of peaches for any two years within ten years after planting the trees, as pay for planting them, is held valid in *Dickey vs. Waldo*, 23 L. R. A. 449, although the property to be divided is not in existence. A note to the case collects and analyzes the multitude of authorities on the sale or mortgage of future crops.

What effect as notice a conveyance will have when made and recorded by one who has no title, but gets title afterwards, is a somewhat novel question. In *Missouri the case of Ford vs. Unity Church Soc.* 23 L. R. A. 561, decides that it has no effect as against a subsequent purchaser from the same person after he gets title. So far as the authorities have touched the question, they are found in the annotation of the case.

Whether or not a residence can be acquired for the purpose of voting, while attending a school or public institution, is the question discussed in the Michigan case of *Wolcott vs. Holcomb*, 23 L. R. A. 215, which denies that the residence of an elector is changed by reason of his presence and support in a soldier's home. The authorities on the question are collated in a note to the case.

MANDAMUS,**Inspection of County Commissioners' Books.**

(Sixth Judicial Circuit—Ottawa County—June Term, 1894. Present; Hons. C. S. Bentley, P. J.; C. H. Scribner and G. R. Haynes, J. J.)

The State of Ohio, ex. rel. Webster, vs. John H. Burleman. By appeal from the Common Pleas Court.

BENTLEY, J.

This case came into this Court by appeal. There is a demurrer filed to the petition on the ground that it does not state facts sufficient to constitute a cause of action. The case has been submitted to this Court upon that demurrer. The petition says, "that the relator is, and during all the times hereafter mentioned, has been &c." (reading the petition at length.)

The demurrer raises the question whether those facts warrant the remedy asked for. It is well known that the office of a writ of mandamus is to require something to be done in the future; it is not primarily for the punishment of any particular past offense, but solely for the purpose of having done in the future some act which it is the duty of the officer to perform.

Section 6741 provides: "Mandamus is a writ issued in the name of the State, to an inferior tribunal, a corporation, board, or person, com-

manding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." And it is held, and of course is a matter of common knowledge in the law, that the writ will not issue unless the averments of the petition for the plaintiff put the respondent in default; the petition, in other words, must show the necessity for the issuance of the writ in order to get the particular act performed, which the party has a right to exact.

Now, in view of these considerations, does this petition meet the requirements of a petition for mandamus? I call attention to the fact that it simply recites that on one certain occasion in the past the Relator called upon the Auditor for the purpose of getting an inspection of a certain book; that on certain other occasions in the past he was refused inspection of the book, the County Commissioners record, and that on this particular occasion the book was kept under the Auditor's control and concealed in his office. Those are the averments in the petition upon which the prayer for mandamus is based, and there are no others stated. It is to be noticed in this connection that the petition does not state that the Auditor now refuses to allow this book to be inspected or that he says he will in

the future refuse to allow the relator the chance to inspect it, or that he will keep it concealed, or that that is his purpose, or that he claims any right to do so, from which might follow the idea that he would do in the future the things which, perhaps, wrongfully, he did in the past. But averments of this kind are necessary to justify the issuance of this writ. If any writ should issue on this petition or any remedy given whatever, it would be simply in punishment for an act, or a certain number of definite acts which have taken place in the past. So, really, the question which is practically discussed by counsel is hardly raised in this case, that is, whether or not the Relator might go into the Auditor's office, and without disclosing what he wanted, require the Auditor to allow him to look at the Commissioners record. I might say that that not being necessary to our judgment in this action, we need not and do not pass upon it, yet from such discussions as we have had, our present idea about the matter is that it is not necessary for citizens and taxpayers when they want to look at the record at the proper time and under the proper circumstances, to disclose minutely to the Auditor just what they want to look at that book for; but if, as a matter of fact, the

citizen's approaches to the Auditor were under such circumstances that it was not the Auditor's duty to gratify his curiosity or he was seeking the book for an improper purpose or purposes for which the law does not provide such a book, these would be defensive facts for the Auditor. But I say that it is a matter which we don't undertake to decide, simply throwing this out as our present impression, not binding upon us in case the matter should be presented again. But because the petition is not rightfully framed we think the demurrer should be sustained:

Marshall & Hull for relator.

E. G. Love for respondent.

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DITCHES.

Application for Relief Under Amendment of 1891 to Section 4560 R. S. Denied, as Intranching Upon the Principle of Res Adjudicata.

(Sixth Judicial Circuit, Sandusky County. At Chambers. Present, Hon. C. S. Bentley, P. J.; C. H. Scribner, J.)

James Fuller, plaintiff, vs the Trustees of Townsend Township, Sandusky County, Ohio, and Reuben Haff, defendants.

BENTLEY, J.

The plaintiff in this case complains of injustice inflicted upon him, as he says, by the order of the township Trustees of Townsend township, Sandusky County, in locating and establishing a certain township ditch through the lands of plaintiff and others in 1881, and in the apportionment to the plaintiff of a large amount of said ditch to construct—being all of the ditch through his land. He also complains of said action of the Trustees in providing that said ditch should be an open one instead of allowing the plaintiff to tile that portion of his own land, which tiling he says, he is willing to do and which would be of no injury to Haff or the Trustees or to himself, while the open ditch would be an injury to him. He also says that the ditch as petitioned for ran direct to a natural water course upon his land after traversing his land only about 35 rods, but the Trustees without authority changed the route so as to reach the same water course upon his land but at a different point, after traversing upon his land the two sides of a right-angled triangle 77 rods and near to woods which would interfere with a ditch either tiled or open. The plaintiff

says that he has sought a remedy for these matters heretofore in two actions which were each taken to the Supreme Court, in each of which he was unsuccessful; and he says that said former actions were commenced and prosecuted before the amendment of 1891 of R. S. Section 4560, so that although he is bound to admit that the adjudications in those cases conclusively settled the matter against him as to any relief as the law then stood, yet said amendment of 1891 making section 4491 applicants to township ditches, now gives courts of equity jurisdiction to award him relief by inquiring into the general justice of the whole proceeding before the trustees, and, even if there be nothing actually erroneous in them, correcting any gross injustice and making such order in the premises as shall be just and equitable. He prays that he may be allowed to make said direct tile ditch, that the expenses may be reapportioned, and that the defendants may be restrained pending this action from selling the construction of said open ditch through his land, and for general relief.

On the hearing before us he offered, without objection, affidavits to the effect that the ditch as laid was of no public utility, of no benefit to him or to his land, and these were met by counter affidavits on behalf of the defendants.

We do not think that the amendment of 1891 was intended to give authority to courts of equity to hear anew questions which the laws provide shall be submitted in the first instance to county commissioners and township trustees in ditch proceedings, upon its being suggested that such inferior tribunals have come to wrong conclusions upon questions of fact. Whether a ditch will be

conducive to public health etc. is to be submitted to the commissioners or trustees, and, while courts of error will supervise if the record discloses affirmatively, as in 42, O. S. 202, that an erroneous construction of the statute has been followed, courts of equity will not, ordinarily at least, set aside their conclusions of fact upon such questions, nor grant the right to tile a ditch where such permission has been refused by township trustees merely because the court might think that, from the facts disclosed, the privilege or right to tile ought to have been granted.

The ditch proceedings were pending at the time of the adoption of the said amendment of 1891. This amendment was not made in terms to apply to such matters as should be then pending or existing, and it is doubtful whether under section 79 such express provision would not be necessary. But if it might be said that said law of 1891 provided a new remedy for parties who had suffered a wrong, and that they should be allowed its benefits as though it were an independent enactment and not an amendment to an existing statute, still we do not think it should be held to apply to a case like the present, virtually reopening a controversy which had long been settled by the highest tribunal of the state. To apply it here would be to allow its application in a multitude of past transactions and proceedings to the unsettling of judgments and orders, which, certainly, was never intended. In strictness the plaintiff's petition is not such as is mentioned in section 4560 or 4491 in defining the kinds of action in which the Court might grant the relief therein provided for. These Sections do not allow interference with the orders of the trustees or commission-

ers unless error has so intervened in them as to warrant the Court in setting them aside except that "without finding such error the Court may correct any gross injustice in the apportionment" In this case, any correction of the apportionment in favor of the plaintiff would be to order that he dig or pay for less, and that other parties dig or pay for more of the ditch as ordered constructed than is provided in the order of the trustees. Such a correction by the Court, in view of the history of the record and the repeated adjudications in favor of the defendants upon it, would trench upon the principle of res adjudicata and be finally futile. We are therefore constrained to deny the application to suspend the order dissolving said temporary injunction.

We have considered this matter as if there were no doubt as to our jurisdiction, but there are no papers or transcripts before us showing that the order complained of has been actually appealed to the Circuit Court and the appeal perfected. Doubtless counsel are right in the statement that the appeal has been perfected, but in strictness the papers should have been marked filed in the Circuit Court and a certificate from its clerk should have shown the filing of the bond.

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PARTIES TO AN ACTION.

(Sixth Judicial Circuit—Huron County, Ohio, April term, 1894. Present: HON. C. S. BENTLEY, P. J., C. H. SCRIBNER and G. R. HAYNES, J. J.)

R. Fertel, Plaintiff in Error, vs. R. W. and J. Sampliner, Partners etc., et al, Defendants in Error.

(Mr. R. having a stock of goods made certain chattel mortgages to C and others: the several mortgagees, acting under the clause which provided that whenever they deemed it necessary for their more perfect security they might take possession of the goods, took possession of the goods: afterwards R made a general assignment to S for the benefit of creditors: the mortgagees in possession of the goods then made an arrangement with S, the assignee, whereby it was agreed that he might assume and take possession of the mortgaged goods, as agent for the mortgagees, for the purposes of selling the same, paying the mortgages and retaining any balance which there might be for the benefit of the creditors of R. Subsequently other creditors commenced an action of replevin, making the assignee alone defendant, and replevied certain of the mortgaged goods: thereupon the mortgagees voluntarily appeared in said action of replevin, asked and obtained leave to be made parties thereto and filed their cross-petitions: subsequently, upon motion of the plaintiffs in replevin, the Court ordered the cross-petitioners dismissed as being UNNECESSARY AND IMPROPER PARTIES. HELD, That such dismissal was error. ED. LEGAL NEWS.)

BENTLEY, J.

The case of Fertel against Sampliner and others, and the case of Cohn against Sampliner and others are two separate proceedings in error prosecuted to reverse the judgment of the Court of Common Pleas in a certain case pending therein wherein Sampliner and others were plaintiffs and Timothy R. Strong, as assignee of one Rich, and these petitioners in error were parties defendant. The questions which were raised in the two cases are substantially identical, and the cases were argued together and submitted together and will now be disposed of together.

That the record may fairly show the situation under which the judgment of this court is rendered, I will briefly state what the situation was in the Court of Common Pleas.

It appeared that a Mr. Rich, a mer-

chant having a stock of goods, made certain chattel mortgages covering the same, one to Mr. Fertel and one to Mr. Cohn, and others to other parties.

The chattel mortgages contain in the stipulations as to the possession of the goods meanwhile,—“that if the debts secured thereby should not be paid according to the terms recited, the mortgagees could take possession of the property and sell and dispose of the same for the purpose of paying themselves and render the over-plus, if any, to the mortgagor. They also contain the other usual stipulations providing, in substance, that in case the mortgagees, at any time before the debt became due, deemed it necessary for their more perfect security, they might take possession of the goods. These several mortgagees, acting under this latter clause of the chattel mortgages, did take possession of the goods, and sometime after they had actually taken possession, Mr. Rich made an assignment to T. R. Strong: upon the assignment to T. R. Strong, which was a general assignment for the benefit of the creditors of Mr. Rich, the mortgagees in possession of the goods, made an arrangement with Mr. Strong whereby it was agreed that he might assume and take possession of the goods as the agent of the mortgagees, and that he might sell and dispose of them, and out of the proceeds, after paying the costs of the sale, pay the mortgagees, and the balance, if any there be, of course, would remain in his hands as assignee of the creditors of Mr. Rich.

Thereupon, under such an arrangement, Mr. Strong took possession of the goods from the mortgagees, and while he had possession in that way, sometime after that, Sampliner and others who are

defendants in error here, began a suit of replevin, making the assignee alone defendant, and replevied certain of said goods that were in Mr. Strong's hands as aforesaid. The petition in the replevin case was the ordinary petition in replevin. It did not set out the details in any way, or the manner in which Mr. Strong had come into possession of the goods, or how he claimed any title to them, if any he did claim; nor how the plaintiff claimed title; but it simply made the general averment that the plaintiff was the owner of the goods and entitled to immediate possession of them; that they had come into the hands of Mr. Strong as the assignee of Mr. Rich; that the plaintiffs had demanded them of him and that he had refused to deliver the goods.

Thereupon, they instituted this suit. They gave their bond in replevin to double the amount of the appraised value, which was between ten and eleven hundred dollars, or perhaps over eleven hundred dollars, and as it would appear, took the goods into their possession in the ordinary way of replevin, after giving bond.

Thereupon, while that action of replevin was pending in the Court of Common Pleas, these mortgagees, not having been named as defendants, voluntarily appeared before the Court of Common Pleas representing that they had an interest in the subject of the action, and asked to be made parties defendant, and the Court of Common Pleas ordered that they be made parties defendant and allowed them to file answers and cross-petitions in the case in which they did. Subsequently, on motion of the plaintiffs in replevin, the Court ordered their cross-petitions dismissed and ordered the

cross-petitioners dismissed out of the action as being unnecessary and improper parties. Thereupon they took exceptions and filed these actions in error for the purpose of reversing that judgment of the Court, dismissing them out of the replevin action; and that is the matter presented here for adjudication, that is, as to whether the Court of Common Pleas correctly or erroneously ruled under those circumstances.

In behalf of the defendant in error, it is urged that whether the Court of Common Pleas should allow other parties, as these cross petitioners, to come into the case or not, was a matter of discretion, and although he had allowed them to come in, yet the same discretion which he might exercise in allowing or refusing them leave to come in still existed, and that with a like exercise of discretion, he could dismiss them out of the case, having once allowed them in. It is also claimed on behalf of the defendants in error that, as the Court of Common Pleas simply ordered their cross petitions dismissed, ordered them dismissed out of the action, and as one paragraph of the motion asking them to be dismissed, and reciting that they had obtained this order to become parties without any notice to the plaintiffs in replevin, and without any knowledge on their part,—that per-adventure, for all the record shows, the Court of Common Pleas may have acted upon that paragraph, and simply dismissed them because they had surreptitiously got into the case as defendants.

Now, first disposing of these two claims, we think that the same rule will not apply, upon the application of a party to be made a defendant, and upon a motion to discharge him, after he was made a party defendant,—that even if it

were a matter of discretion in granting the application in the first instance, after a party has been allowed to come in and prepare a cross petition and file it and become a party defendant to the case, he ought not to be sent out of the case by order of the Court without a fair and sufficient reason, and that upon the exercise of the mere discretion of the Court of Common Pleas, the Court could not dismiss him out of the action.

As to the other claim that, for all the record shows, the Court may have acted on account of the want of notice,—we will say that we know of no direct requirement whereby it is necessary for a party thus asking to be made a party, to give previous notice to the other party or parties that may be already in the case. His application is presented to the Court and it is the Court that must find whether or not, by the allegations that he makes, or the showing that he makes upon application, he is a proper and necessary party to come in, and if the Court orders him to come in, or makes an order allowing him to come in, and he does come in, we think the Court would not be justified in dismissing him from the action for the mere reason that he did not give previous notice which was not directly required, there being no allegation of the want of good faith in the matter, and no suggestion of any fraudulent creeping into the case, or interloping in it other than that.

The Court of Common Pleas in its entry in this case, did not place its ruling upon the ground of a want of notice, but found in so many words that, in its judgment, that these cross petitioners were unnecessary and improper parties. So that we must presume that the order was not based upon want of notice. The

judgment of the Court of Common Pleas was that they were unnecessary and improper parties.

This matter is seemingly comparatively simple, yet it may be precisely in line with questions of property that are very important, as they bring into view the whole scope of the administration of the statute regarding assignments of insolvent debtors.

It must be supposed that the Court of Common Pleas in dismissing these parties out of the action, held that notwithstanding the facts that I have already narrated being shown by their answers and cross petitions, nevertheless, the assignee in insolvency must be said to represent them in every claim that they could make properly in a replevin suit, and to represent them so thoroughly that his representation should be deemed exclusive, so that any act on their part as parties would be utterly unnecessary.

Of course, the Court could not have proceeded upon the idea that the cross petitioners showed no interest in the subject of the action, because they had set up their mortgages and that they were in dispute, and we must suppose that they were in possession just as they allege; *prima facie*, they exhibit a most vital interest in the subject of the action, namely, the goods replevied.

Now, it is true that upon the assumption that the assignee did represent these parties, they were improper and unnecessary parties to the action? We think it does not follow necessarily, and the case in the 14th, Ohio State beginning on page 200,—*The Union Bank at Massillon vs. Phillip V. Bell and others*, decides this matter the other way. On page 211, I read:

"In the case before us, the defendants,

who answer and set up the usury, are judgment creditors; but as their judgments were obtained subsequent to the execution of the conveyance in trust for the benefit of creditors, there was no title remaining in the mortgagor on which a judgment lien could attach; and therefore, if these defendants have a right to set up the defense of usury, it is in virtue of their being creditors simply, and beneficiaries under the deed of trust.

"And we think they have such right." (This was an assignment in insolvency.) "That the trustees under the deed of trust, might set up this defense is clear. But they are mere trustees. They have themselves no personal interest in this controversy. The real and substantial interests involved are in the *cestui que* trust whom they are entitled to represent, and to whose benefit the defense, if made by the trustees must endure. But the trustees in this case have failed to answer, and thrown the burden of the defense upon the creditors whom they represent. We can see no reason why those creditors should not be permitted directly to make any defense which the trustees might make for their benefit. Section thirty-five of the code of civil procedure provides, that 'any person may be made a defendant, who has or claims an interest in the controversy, adverse to the plaintiff.' These creditors have an interest in the controversy adverse to the plaintiff; they are, therefore, proper parties defendant as an idle ceremony merely, and that being such parties, they may not avail themselves directly of a defense which would be available for their benefit if made indirectly through their trustees, seems to us to be wholly inadmissible."

It is very certain that if this subject of

the action was real estate, and these parties had mortgages on the real estate, they would not only be proper, but necessary parties in a Court seeking to deal with it, or to subject it to sale. But they certainly had an interest in this personal property and, but for the assignment, they may have gone into a Court of equity for foreclosure of their mortgages and have made any party claiming any title or interest in the goods, a party defendant.

There are various considerations that arise and indicate that not only may parties, standing in the relation these parties did to the goods, be proper parties, but it would seem that the propriety of their being parties arise almost to a necessity in one view of the case. The plaintiffs come here claiming that Mr. Rich, the assignor, obtained goods from the plaintiffs by fraudulent representations under such circumstances that the sale was voidable, and exercising the option of avoiding it, they brought this replevin suit.

If that is so, of course, there was in Mr. Rich, as against everybody up to the time of the replevin, at least, a little to those goods, and the plaintiffs, although defrauded of them, may have seen fit to waive their objection on the ground of fraud and to have held him upon the contract. It was for them to say, under the circumstances between them and Rich, whether or not they should rescind the sale, or whether they should let it stand and have their action for the purchase price, whatever that was.

Now, when they bring this replevin action for them and make the assignee a party, supposing that upon the trial, they should show the truth of these claims that they make against him, namely that the title obtained by Mr. Rich in the first

place was a voidable title; that he had obtained these goods by fraud, it would result from that, if a jury found that fact to exist, *as against Mr. Rich, or as against his assignee for the benefit of creditors*, the plaintiffs would prevail as to *all* of the goods, so that if the jury should be called upon to assess anything in favor of the defendant, it must rest wholly upon such rights as the chattel mortgagees might have as innocent purchasers to a portion of the goods.

Conceive a case of that kind to be given to a jury, and the Court comes to charge the jury; the judge must necessarily charge that if the jury find that the title was fraudulently obtained, they could not find anything in favor of Rich and could assess no damages in favor of his assignee merely as such,—merely as holding the property that Rich once had. But he would have to deal with the other possible phases of the question for peradventure, the jury might find that, notwithstanding the fraudulent purchase, the mortgagees were purchasers in good faith, and under such circumstances that replevin could not prevail against their mortgages. Somebody must set that up, and if the assignee alone were in the action, he alone must have a judgment, not for the value of the goods, but for the value of such portion of the goods as were covered by the mortgage, and that, not for the full value of the goods, but only to the extent of the amount unpaid on the mortgages. Supposing that there were three mortgages, and as to two of them, the mortgagees were innocent purchasers for value, and as to the third one the mortgage had been taken under such circumstances that the mortgagee could not make out his claim of being an innocent purchaser; the Court would have

to deal with all of these questions, and the measure of damages which the jury must award to the assignee, or whomever was the beneficiary,—the verdict of the jury for the defendant's damages, would have to be determined by the rights which the mortgagees alone had acquired,—rights which never did come to Mr. Rich in such a way that he could enforce them as against the plaintiff's rights, and which his assignee in insolvency could not, as such, enforce against them.

The assignee in insolvency, being the sole defendant in the replevin suit originally, did not set up these matters of the mortgages; did not allege that, whatever may have been the original contract, those goods had been mortgaged to innocent purchasers,—the mortgagees of Mr. Rich; but he simply set up a general denial except admitting generally that he was the assignee in insolvency of Mr. Rich.

It is possible that, under the holdings of the supreme court, that answer is sufficient to let in any kind of testimony that would defeat the plaintiffs in their title to the goods, either in whole or in part; but, even if that is true as a strict matter of law, it will be seen that the assignee as such, would have very little interest in making that sort of a defense, after all possibility of his getting out any goods for the creditors had faded away. And so, in view of that possible juncture of affairs, it would seem to us to be exceedingly appropriate that these parties,—these mortgagees, should be allowed to make that defense.

Supposing, in the case I have mentioned, the jury should bring in a verdict, say, of a thousand dollars, in favor of the defendant assignee; by the very necessity of the case, he would not know how to

distribute that, and the probate court would not know how to distribute that as between the mortgagees, unless the jury should designate on account of which mortgage they allowed that, and whether they allowed it by virtue of any mortgage, or simply found generally against the plaintiffs, so that the verdict of the jury must necessarily be special to work out any kind of justice in the case, and no person would have such vital interest to see that the jury were properly instructed in that regard, as to the special findings they should make, as to those mortgagees.

As to the propriety of allowing these parties to be made parties defendant, the provisions of the code are pretty sweeping; for instance, section 5014 provides, "In an action for the recovery of real or personal property, a person claiming an interest in the property may, on his application, be made a party."

Here are parties that certainly have an interest in these goods. This is an action for the recovery of personal property, and it is provided in section 4994 that, "The rule prescribed in the preceding section may be so applied, when a person forfeits his bond, or renders his sureties liable, that any person injured thereby, or who is by law entitled to the benefit of the security, may bring an action thereon, in his own name, against the person and his sureties, to recover the amount to which he is entitled by reason of the delinquency, which action may be prosecuted on a certified copy of the bond." That is, when these plaintiffs in replevin gave their bond in replevin, they gave it under all the provisions of the statute bearing upon the subject, if the provisions of the statute would allow parties other than the mere nominal defendants to enforce it, as being inter-

ested in it, it is shown that it might be that these cross petitioners would have a vital interest after a verdict of the jury in the amount of the bond.

It is not to be supposed, we think, that the court of common pleas dismissed these parties out of the action because their rights were not in jeopardy in any way, in it; but that, being out of the action, they were perfectly free to go and replevin the property themselves. We can hardly think that was the reason upon which the order was made. And upon this other motion, section 5006 provides that, "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of a question involved therein.

These are the general provisions as to which section 5014 is more specific. This applies generally to all actions and the other section applies specially to actions for the recovery of personal property.

Section 5013: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a determination of the controversy can not be had without the presence of other parties, the Court may order them to be brought in, or dismiss the action without prejudice."

I have already discussed how difficult it would be at least for the Court to mete out general justice to all parties who had any interest in this case in replevin, that is, to complete final adjudication in the Court of Common Pleas, without the presence of these parties here. Section 5005 provides, that "all persons having

an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided."

In section 5016, it is provided that, "upon affidavit of a defendant before answer, in an action upon contract, or for the recovery of personal property, that a third party, without collusion with him, has or makes a claim to the subject of the action, and that he is ready to pay or dispose of the same as the Court may direct, the Court may make an order for the safe keeping, or for the payment or deposit in Court of the subject of the action, or the delivery thereof to such person as it may direct, and also an order requiring such third party to appear in a reasonable time, and maintain or relinquish his claim against the defendant."

It will be seen from these various sections and others that might be cited, that it was the idea of the makers of the code to adjudicate in one action the rights of all parties in the subject of the action, so far as it could be properly done; so that we think there was ample power to allow these parties to come in, and under the direct provisions of the code, they were proper parties, and the considerations to which I have already alluded would seem to indicate that the propriety, as I have said, amounts almost to a matter of necessity, and it would be sanctioned by this case in the 14th Ohio State which I have cited.

All that proceeds upon the idea, so far as I have discussed it, that the assignee in insolvency does in fact, or might in fact, represent every interest here, of these mortgagees; and that their interest under these circumstances had passed over to the assignee. Where the assignee takes the title and the possession of

property immediately from the assignor, then the lien holders upon the property must seek their remedy through the assignee and the orders of the Probate Court which directs him. But there is no direct holding as to the rights of mortgagees of personal property who have actually assumed possession, or are in possession before the assignment.

It may be said here, that whatever their rights may have been, if they had simply held on to the possession in defiance of the application of the assignee to be allowed possession, in this particular case, they allowed the assignee, the person who was in fact assignee, to go into possession of the goods, although they say it was by some arrangement by which he became their agent. It is a subject for thought whether it is not an unfortunate position for the one man to occupy; possibly the different interests may become antagonistic. There is ground for argument that where mortgagees have thus allowed the assignee to come into possession, no matter under what general arrangement, if they made any arrangement whereby his title and the possession were allowed to merge, the matter is to be disposed of exactly as if they had not taken possession beforehand and he had taken possession generally as assignee. I say, without deciding that question, it is a matter that would warrant argument on both sides and it shows that it should have the consideration of the Court with all parties in interest before it.

Suppose it be held finally that the assignee did not in the circumstances, represent the prior mortgagees; quite likely the claim might be made in the Court of Common Pleas that he simply took such title as Rich had, and had not the power to represent the rights which the mort-

gages had, and which had accrued to them by reason of the acts lately anterior to his appointment.

I do not say that that argument would prevail, but it is an argument still, and bears upon the propriety of allowing these parties to remain in the Court of Common Pleas and make their fight.

And now, over and beyond all these claims, there is another view that might be taken of a case of this kind, which I will now endeavor to present. Supposing that the law of Ohio regarding the assignment of personal property were now such that when the owner of property makes a chattel mortgage, even if the mortgagee comes into possession before the mortgagor assigns, but he assigns before the mortgagee has reduced the property to money and paid himself; suppose the law should be held to mean that the assignee had, in fact, the right to the possession, even as against the mortgagees, the right of demanding it of them and compelling them to yield it up; that is, suppose that the whole scheme of the statute should be held to mean that when personal property is assigned generally for the benefit of creditors, the assignee immediately represents all parties; that upon his acceptance of the assignment, the whole property of the assignor comes into the custody and jurisdiction of the Court, itself presiding over the matter of this assignment; then the effect would be that the mortgagees must take their mortgages with reference to the statute. The terms of the statute would enter into them and become a part of them. So, if they were to have any actual possession, as in this case, they might be compelled to turn it over to the assignee, because if held so, the property being in the custody of the law,

the law pointing out that it should be reduced to money by the agency of the assignee, that method must be followed.

If that were the view of the case, it would probably follow that the parties who claimed that the goods were held by the assignor by a voidable title, and who sought to replevin them, would not be allowed to institute an ordinary action in replevin and take them from the possession of the assignee thus pointed out, but must seek his remedy in an application to the probate court which had jurisdiction of the goods and their disposition to have the sale rescinded and their possession restored. If that were so, if he were not allowed legally to prosecute an action in replevin, but must go into probate court and seek his remedy, if he did begin an action in the court of common pleas, notwithstanding that, it would be of exceeding importance that some person should intervene in the court of common pleas, and apprise that court of the facts under which this replevin suit was instituted so that it might make an order forbidding the delivery of the goods by the sheriff to the plaintiff in the ordinary way; or that, being apprised of the facts, it might order the sheriff to hold the goods until proper application could be made to the probate court for the appropriate remedy. In such a case, where a party had interfered with goods in the possession and legal custody of the law, as administered by the probate court,—if that were the law,—then the only pleadings that would apprise the court of common pleas of this situation of affairs in this particular case were the very cross petitions which were stricken from the files thus leaving no pleading in the court of common pleas showing the facts.

Without deciding that this is the law of

the case or whether it is or not, but seeing that possibly it might be the law in the case, the suggestion bears upon the question here. The supreme court of Illinois in more than one case, especially in the 115-Illinois, page 220, directly hold:

"After the county court has once acquired jurisdiction of the estate of an assigning debtor, he and the assignee and all other persons having an interest in or upon the estate, are subject alike to the judgment of that court; and a claimant of any property assigned for the benefit of creditors will not be allowed to take the same from the assignee by a writ of replevin from another court, but he may present his claim to the county court, which is authorized to call a jury to try the right of property."

I read from the opinion of the court on page 224:

"It is true that the right and power of a failing debtor to pass the title of his effects to an assignee remain as they did before the statute, but this is all. The power to control the disposition and beneficial enjoyment of his property upon such transfer of the title is essentially different from what it was before the statute. Prior to its adoption the insolvent debtor could distribute his property among his creditors just as he pleased. If there was not sufficient to pay all, he might direct the whole of one's claim to be paid and only half of others, or he might prefer the claim of a single creditor to the exclusion of all the others, and the assignee would be bound to carry out his directions. Then the county court had nothing to do with the assignee, or the effects in his hands as such assignee. Such is not the case now. The statute has wrought a radical change in the law in these and other respects.

All voluntary assignments for the benefit of creditors now stand on the same footing. The effects of the assignor must in all cases be distributed ratably among his creditors, and any provisions in the deed of assignment directing otherwise will be inoperative and void."

On page 227, after going through and citing the statutes of the State of Illinois which in fact, seem to be very similar to our own, the court says:

"The careful consideration of the several sections constituting the above act, particularly the 7th and last, will leave but little, if any, doubt in our minds that it is essentially, in its framework and detail, a general insolvent law, and that it was so intended by the legislature. By its provisions a new and special jurisdiction was created and conferred upon the county courts of the state, in the exercise of which it is manifest they would, to say the least of it, be greatly embarrassed if any interference by other tribunals were permitted, where the jurisdiction has once attached. Indeed to permit such interference would practically defeat the chief object of the statute, namely, to provide a convenient, expeditious and inexpensive tribunal through the instrumentality of which an insolvent debtor may make an entirely equitable distribution of his effects among his creditors. If after the jurisdiction of the county court has attached third parties having real or pretended claims to or upon trust estates were permitted, by means of process issued out of other courts, to take possession of the property in the hands of the assignee, for the purpose of litigation in such other courts, the county court by this means might be deprived of its jurisdiction altogether. In any event it would necessarily

so retard and embarrass proceedings in the county court that it would be impossible to administer the estate in the manner or within the time prescribed by the act, and to that extent would render the statute inoperative. A construction leading to that result ought not to be adopted. To give the statute practical effect in all its provisions, would fully constrain us to hold, as we do, that upon the making, filing and recording of an assignment, with the lists and schedules annexed, the county court wherein such assignment is filed and recorded, in its character as an insolvent debtors court by operation of law at once acquires jurisdiction over and takes possession of all the property and estate embraced within the assignment, subject, of course, to all prior liens or claims that other parties may have to or upon it. The fact that the legal title is in the assignee and that he acquired it by the voluntary act of the assigning debtor, makes no difference in this respect. As a valid assignment can now only be made under the statute, and when so made must be administered and distributed substantially in conformity with its provisions, it is a matter of little, if any, consequence as to just where the legal title is or by what method it was acquired, except so far as it effects the jurisdiction of the court. The assignee, the insolvent debtor and all persons claiming an interest in or upon the fund, are subject alike to the summary jurisdiction of the court, and whatever rights, real or supposed, with respect to the fund must primarily be litigated therein, and that there may be no failure of justice, the act, as we have already seen, clothes the court with power, when in its judgment the exigencies of the case require it, to order a trial by jury. While the legal title to the fund is in the

assignee, the possession of it, as we have just seen, is in the court, and the assignee's relation to the court is analogous, in some respects, to that of a receiver, or of an assignee in bankruptcy. If effect is to be given to these general principles, and the statute is to receive a construction which will effectuate the objects and purposes of the legislature in adopting it, it is clear there was no right to replevy the goods in question, as was sought to be done. (103 Ills. 329; 7 Blatch. 18.)"

The Supreme Court of Ohio to be sure has never gone to that length, but it will be seen that if the whole controversy may be drawn in the replevin suit to the Court of Common Pleas, the whole administration of these assignments might be taken out of the Probate Court where the statute has put it and be brought into the Court of Common Pleas.

As I have before said we do not hold that the views expressed by the Illinois Court should be adopted as the law in this case, but it is a view of the matter which might be presented; and in view of all the reasons which we have discussed, it seems clear to us that it was proper and in fact, necessary to allow these parties having specific liens upon those goods, being already in Court of Common Pleas, to remain as cross-petitioners therein, and so to be in a situation to aid the Court finally in disposing of the case. For these reasons, we think the Court of Common Pleas may be said to have erred in dismissing the cross-petitioners from the case; therefore, it is ordered in each of these cases, that the judgment of the Court of Common Pleas be reversed and the case will be remanded to the Court of Common Pleas for further proceedings.

Stewart & Rowley, for plaintiffs in error.

J. H. Sampliner, L. C. Laylin and C. H. Stewart, for defendants in error.

SERVICES OF MARRIED WOMAN.

When Compensation for Such Services is
a Wife's Own Property.

(Supreme Court of New York. General Term,
First Department, June, 1894. Present: Hons.
Morgan J. O'Brien, P. J.; David L. Follett and
Alton B. Parker, J. J.)

Louisa Stokes, appellant, vs Laura
Pease, as executrix of Mary Ann Banks,
deceased, respondent. Appeal from a
judgment entered on a report of a referee,
dismissing the claim, with costs.

T. McCants Stewart, for appellant.

William E. Wyatt, for respondent.

FOLLETT, J.

Since some time anterior to February
1st, 1885, the plaintiff has been a married
woman, residing with her husband at No.
125 West Twenty-seventh street. Mrs.
Mary Ann Banks, a widow, and the plain-
tiff were sisters. For many years prior
to her death Mrs. Banks was a paralytic
and unable to care for herself. From
February 1st, 1888, until August 1st, 1891,
three years and six months, she was cared
for by the plaintiff, as a member of her
family, at No. 125 West Twenty-seventh
street, under an agreement made with
the plaintiff that she would give and de-
vise her property to the plaintiff. April
15th, 1893, Mrs. Banks died, leaving a
will, which was probated June 2nd, 1893,
and letters testamentary thereon were
issued to the defendant. Testatrix left
an estate of \$1,800. On the 16th of June,
1893, the plaintiff presented a claim for
twenty dollars a week for her services as
nurse from February 1st, 1891, which
was rejected and the claim was referred,
pursuant to the statute. There is no dis-
pute about the facts of the case. It was
proved that the testatrix agreed with this

plaintiff to compensate her for her care
by bequeathing to her her property.
That the care was rendered is conceded,
together with the fact that nothing has
been paid therefor, and that the testatrix
bequeathed no part of her estate to the
plaintiff. The referee dismissed the
claim and ordered a judgment against
the plaintiff upon the theory that she, be-
ing a married woman, her services be-
longed to her husband, and that they
could not be recovered in her own name.
In this, under the facts proved, we think
he erred.

Section 2 of chapter 90, Laws 1860,
provides: "Section 2. A married woman
may bargain, sell, assign and transfer her
separate personal property, and carry on
any trade or business, and perform any
labor or services on her sole and separate
account, and the earnings of any married
woman from her trade, business, labor or
services shall be her sole and separate
property, and may be used or invested by
her in her own name."

Chapter 381 of the Laws of 1884 pro-
vides: "Section 1. A married woman
may contract to the same extent, with
like effect and in the same form as if un-
married, and she and her separate estate
shall be liable thereon, whether such
contract relates to her separate business
or estate or otherwise, and in no case
shall a charge upon her separate estate
be necessary."

Under these statutes if a married wo-
man, with the knowledge of her husband,
renders services to a third person, pursu-
ant to a contract for compensation, she
may maintain an action to recover the
price agreed or the value of the services
rendered (*Adams vs Curtis*, 4 Lans., 464;
Sheldon vs Bullon, 5 Hun. 110; *Snow vs
Cable*, 19 id., 260; *Rowe vs Comley*, 11

Daly, 317; *Matter of Kimney and Gray*, 14 N. Y. St. Rep., 618; *Brooks vs Schwarin*, 54 N. Y., 343; *Birbeck vs Ackroyd*, 74 id., 356.)

In addition to the express contract between the plaintiff and the testatrix it appears that the former was engaged in business own her own account as a laundress, and it was shown on the trial that she was compelled to hire extra service because her time was occupied in caring for her sister.

The contract and the facts bring this case within those above cited, and without *Reynolds vs Robinson*, (64 N. Y., 589 82 id., 103) and *Coleman vs Burr* (93 id., 17.) The common law presumption that the services of the wife belong to the husband exists, notwithstanding the statutes above cited; but under them the presumption may be rebutted, and it was in this case.

When services are rendered under an agreement that compensation for them shall be made by will, which is not done, the value of services may be recovered against the decedent's estate (*Robinson vs Raynor*, 28 N. Y., 494; *Reynolds vs Robinson*, 61 id., 589.)

The judgment should be reversed, and a new trial granted before a referee to be appointed by this Court, with costs to the appellant to abide the event.

O'Brien and Parker, J. J., concur.—N. Y. Law J., Sept. 4, '94.



The Toledo Legal News,

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In Advance.



THE ELEVATED RAILROADS ENJOINED.

In the suit brought in the Court of Common Pleas by Thomas S. Maitland, owner of a number of houses in Ninth avenue, to restrain the Manhattan Railway Company from adding a third track on the Ninth avenue elevated railroad, Judge Bischoff granted a motion, argued before him some time ago, for an injunction pending the action. The motions were opposed on the grounds of public authority, public convenience and the absence of any material increase in the physical effects on the property caused by the new track.

In his able and exhaustive opinion, Judge Bischoff says: "To say that for each proposed substantial addition to the railway the abutting owner must, as a condition of injunctive relief, demonstrate a distinct pecuniary loss, is to imply that the defendant may proceed to take piecemeal, without compensation, property which it could not otherwise lawfully appropriate except upon payment of just compensation. To require proof of pecuniary damage as to a condition of enjoining defendants' unlawful acts means to encourage a contempt of law and of the forms of law."

* * * * *

"Unquestionably, a popular desire for increased transit facilities affords the defendant a strong inducement to undertake the construction and operation of the additional track, but does not justify the seizure of public property for such uses without adequate compensation, unless every efficacy of the constitutional interdiction in that respect is to be disregarded. The resultant public inconvenience of the sudden interruption of travel on a railway in actual operation has been held to require a denial of injunctive relief, but the same consideration cannot apply where the railway or an addition to it remains a mere matter of projection. As well might the defendant, after acquiring legislative and municipal consents to the construction and operation of an elevated railway upon a particular street, seize that street in defiance of the rights of the abutting owners, and then with equal vigor urge against every attempted redress that its contemplated unlawful conduct will result in a public benefit."

The motion was argued by Charles Gibson Bennett for the plaintiff, and Julien T. Davies represented the railroad company in opposition.—(N. Y. Law Journal Sept. 1, '94.)

Ohio Legal News.

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TO THE BENCH AND BAR OF OHIO.

The success of the **TOLEDO LEGAL NEWS** has been, as we have stated, on several occasions, a source of continual encouragement and satisfaction to every one connected with the enterprise. At the same time the advanced position which the publication has taken, with such unexpected alacrity, has increased the demand for more complete facilities for its publication, as well as increased attention to the business end of the enterprise. In short, the business has grown beyond the capabilities of a plant which was equipped only for the purpose of publishing a daily paper, an enterprise of great importance in Toledo and of great success locally. For some weeks we have been forced to see the necessity of increasing our force to almost double its number, as well as the necessity of many other changes. All these requirements might have been met in time but the immediate needs of the weekly would still have been, in a measure, neglected. With these facts before us an offer was received from the Laning Printing Company of Norwalk. The result is, to make the story short, the **TOLEDO LEGAL NEWS**, weekly edition, has been sold to that company. Editorially there will be no change, at present anyhow, and the writer, who acknowledges many courtesies from judges and lawyers in Ohio, hopes there may be no occasion for editorial change in the future.—EDITOR.

The proprietors of this paper venture upon its publication, feeling that they will be able to furnish a sheet that will be both a welcome weekly visitor to every law office in this state, and a profitable investment to its occupants.

This issue does not teem with important legal decisions, so much so as we promise for the future, the excuse being, that it has been court vacation time, and current materials from which to draw are scanty. Besides the time we have had since assuming control of the paper has been too short to conclude arrangements for a full line of legal articles and decisions.

An outline of what we promise for the future is, decisions of the various state courts, Supreme, Circuit and Common Pleas; of the United States courts held within the state, embracing all decisions of general application; a discussion of current legal topics, and such legal miscellany as may be of interest or importance to the bench or bar. In short we hold out as an inducement to patrons that we shall furnish them with as complete and accurate a record as it is possible to make of the judicial proceedings and events occurring in the state, and in other states when of interest to our readers.

One feature we shall endeavor to make prominent, and which will distinguish it from other journals in the same field, will be legal news. Various improvements are contemplated, an enumeration of which would be unwise at this time. They will appear to our readers from time as they receive the paper.

It is not a contest for supremacy with other papers. The field is large and there is plenty of unoccupied room. Our policy will be to live and let live. We invite at least a trial support, and a considerate perusal of the merits of our paper.

By the transfer of this paper, no subscriber will lose anything paid, as we shall carry all subscriptions to the end of their term. We succeed to all accounts, and all unpaid subscriptions are our property. Remittances of all kinds should be made to the publishers.

Cash subscribers sent in now will receive a copy of the Local Laws of 1893, free of charge. A description of the book is given on the last page of this issue. This is a rare chance to complete the library of those who have not one of the volumes. The edition is small and the offer will soon be withdrawn.

Injunction and organized labor, a subject discussed by Chas. Claflin Allen, of St. Louis, before the American Bar Association, will be of particular interest to the legal fraternity of Ohio, inasmuch as one of the most interesting of cases adjudicated was disposed of in this state.

The address, for which we are indebted to the *Albany Law Journal*, with its valuable annotations, is published in full in this number of the *LEGAL NEWS*.

To many attorneys who examine this paper this may be a first introduction, they may not having had a chance to become acquainted with the excellent legal journal it succeeds. *The Toledo Legal News* has been published for nearly six months, and contains many decisions of Northern Ohio Courts that would otherwise have been lost to the profession. The issues of this paper will be numbered so as to carry forward that publication to the completion of its volume, and an appropriate index furnished with number twenty-six, so that those who desire to do so may have the volume bound. In this way the work of our predecessors will retain its value. Those who subscribe now can get the back numbers of us, if they desire them, and thus get the work complete.

Circuit court judges of Ohio will meet at Columbus on Tuesday for the annual election of a chief justice and the transaction of such other business as may be necessary. Hon. Gilbert H. Stewart, of Columbus, is the present chief justice. We have not heard who is likely to be his successor.

It should be understood by the profession, if they have not already become acquainted with the fact, that under the new mechanics' lien law, 91 O. L. p. 135, that the owner of a building is made responsible to the performer or seller for all bills for labor or materials used upon the structure, regardless of the fact that he may have paid the contractor for them.

A correspondent writes that New York lawyers have shown unusual ability in arguing political questions before the constitutional convention, and comments that most of them are able to see only one side to the questions under debate. A plan which to one seemed eminently just appeared to another as a scheme to gain political advantage unfairly. Perhaps the training of the courts and the necessity of arguing only on one side prevents some of the eminent members of the bar from taking a calm view of both sides of the question such as befits a maker of constitutions.

The constitutional convention in New York has recently adopted, as a part of the new constitution they are preparing, a clause forbidding state and judicial officers from riding on passes. A spirited controversy arose when it was considered. One of the delegates wanted to make the acceptance of passes punishable by life imprisonment, while another suggested an amendment compelling all who use passes to walk for the rest of their natural lives. If the constitution is ratified by the people, statesmen and jurists must pay or walk in that state. The example will probably be contagious.

A QUESTION.

Judge Miller, of the Clark Common Pleas Court, propounds the following inquiry:

"DEAR SIR: Will you please answer the following question:

"Remembering that every corporation has at least one "officer" who may be presumed to have *some* personal knowledge of the transaction upon which an action is about to be brought; as every individual party is presumed to have *some* personal knowledge of the transaction upon which he is about to bring an action; and every copartnership has at least one member who is presumed to have like knowledge—upon what sound legal principle of construction of sections 5102 and 5109, R. S., should an attorney who files a petition upon a promissory note owned by an *unincorporated* bank be required to have possession of said note before he be allowed to verify said petition by his own affidavit, and the attorney who files a petition upon a promissory note owned by an *incorporated* bank be allowed to verify said petition by his own affidavit, although he has not nor ever had possession thereof, and has never seen anything but a *purported* copy of the same?

"It will not do to beg the question by saying that it is because section 5102 so provides, as said section does not exempt the agent or attorney of a corporation any more than the agent or attorney of an individual from the operation of section 5109."

We do not know of any "sound legal principle" for allowing more latitude in one case than in the other, and our opinion would be that a careful, strict construction of the two sections would not permit it. Section 5109 might be construed to be a limitation upon section 5102. We should be pleased to know what the legal brethren think is the fair construction.—
EDITOR.

The West Virginia Supreme Court recently held in *Poling v. Ohio River R. Co.*, 2 L. R. A. 215, that as a general rule a Railroad Company is not responsible for the negligent acts of United States postal clerks or agents upon its trains. The facts and ruling appear from the following extract from the syllabus:

"A railroad company has a platform and mail crane near a postoffice at which the mail train does not stop, but the postal clerk from the mail car, with a catcher, takes in from the crane the mail pouch suspended thereon, without the train slackening speed. A person who stations himself on the company's land, near the mail crane, for the purpose of witnessing the catch, or for some other purpose of like kind, as a mere voluntary licensee, is subject to the concomitant risks and dangers of injury thus assumed, and the company does not owe him the duty of keeping the mail crane in suitable and safe condition. The railroad company is only liable for such wanton injury as may be done to such licensee by the gross negligence of the company, its agents and servants."

DEFECTIVE WATER SUPPLY.

Liability of Municipality in Case of Fire.

An interesting and novel decision has been determined by the General Term of the Third Department, in the matter of *Springfield Fire & Marine Ins. Co. v. Village of Keeseville*. The action is brought by the insurance company, who had paid the party insured a sum greater than the plaintiff claims it would have been if the defendant had supplied sufficient water to extinguish the fire. The plaintiff alleges that it is a fire insurance company licensed to do business within this State; that it has paid an annual tax to the defendant for the privilege of having the protection of its water-works, its fire department and its appliances, and that the insured has assigned all her rights against the defendant to the company. The plaintiff also claims that the excess of damages caused by the fire, over what would have resulted if the defendant had furnished an adequate supply of water is the sum of \$4,150, and that the defendant had wrongfully and negligently allowed and caused its water-works, pumps, pipes and fire appliances to be and remain out of repair. The question comes up on a demurrer; all the facts are therefore assumed and the most favorable construction is allowed in regard to the allegations of the plaintiff. The opinion holds that there are two functions of every city, one gov-

ernmental, and the other a business power; that the former is given and used for public purposes, and in the exercise of those powers it acts as a municipal corporation; that the latter power is given for corporate purposes, and in the exercise of such power, it is like a private corporation or individual. This has been held in the case of *Lloyd v. Mayor*, 5 N. Y. 469; *Maximillian v. Mayor*, 62 id. 160; *Ham v. Mayor*, 70 id. 459. As a governmental corporation it is not responsible for the acts of its officers or agents, and the maxim *respondent superior* does not apply. But in the exercise of its other functions it is responsible for its omission to perform its corporate duties to the same extent as a natural person would be under the same circumstances. *Conrad v. Ithaca*, 16 N. Y. 158; *Platts v. City of Cohoes*, 89 id. 219.

Judge Herrick, who writes the opinion, holds that supplying water is not a necessary public function of a city, but is merely a matter of private business, citing *Long Island Water Supply Co.*, 30 Abb. N. C. 36, and asserts that the public has no interest in this function of the municipal government to furnish water since individuals must pay for the water supplied them. The distinction is clearly drawn between the liability of the city for the negligence of its fire department in contradistinction to its water-works. Any city which receives rents for supplying water may have absolute control over the action of its employees connected with the water-works, and can employ and discharge them at pleasure. The State does not make it a duty of any municipal corporation to provide and maintain water-works for the benefit of its citizens, though each city usually has control over supplying of water. The judge says that municipal corporations would use a greater degree of care and diligence if they were held responsible to the citizens for their negligence in matters respecting their private corporate existence, and maintains that the measure of duty resting upon a municipal corporation in respect to its streets, sewers, etc., has not always been carefully guarded, for the doctrine has been frequently reiterated in the Court of Appeals that there is no absolute guarantee or undertaking on the part of the municipal

corporation that its streets or other constructions shall at all times and under all circumstances be in a safe and proper condition, and that its obligation and duty extend only to the exercise of reasonable care and vigilance, and that to create liability there must be *willful misconduct or culpable neglect*. *Hunt v. Mayor*, 109 N. Y. 135; *Danaher v. Brooklyn*, 119 id. 241. In the case under discussion the plaintiff's assignor was prevented from using the water that she was entitled to, that she had paid to receive, and that the defendant had impliedly at least contracted to furnish. Negligence in maintaining the water-works was therefore a breach of the contract and the city was liable for any damages resulting therefrom in the same degree as an individual would have been. A city when it contracts to furnish a supply of water does not act as an insurer, for its duty is only to use ordinary care and diligence in performing this function, and its liability is the same as a business corporation which had employed incompetent men, or by its negligence had to carry its contract with an individual for which it would be liable for resultant damages. The municipality had gone into supplying water as a business and had conducted that for its own benefit, and it would seem therefore that the defendant is liable for a breach of its contract, not acting as a governmental corporation in the discharge of its duties as such, but as a business corporation. The right of the plaintiff to sue is necessarily the important question in the action, and arose from privity of contract growing out of the assignment by the insured to the plaintiff of all her rights against the municipality. The insured had paid water taxes and they were paid undoubtedly partly in consideration of the defendant's supplying her with water in case of fire on her premises. The plaintiff acquired the right of action and privity of contract with the defendant by reason of this assignment even though the license paid by the plaintiff to do business in the municipality carried with it no right to have the buildings of the persons it insured supplied with water in case of fire.

The determination of this case by the Court of Appeals will be watched with great interest.—*Albany Law Journal*.

Ohio Circuit Courts

(Sixth Judicial Circuit, Ottawa County. Present: Hons. C. S. Bently, P. J.; C. H. Scribner and G. R. Haynes, J. J. June Term. 1894.)

INCOMPLETE TRANSACTION—EVIDENCE.

AMELIA D. BARDSHAR, Administratrix of Solomon Bardshar, Plaintiff, vs. JOHN HOLTZMAN, ET AL., Defendants. An appeal from the Common Pleas.

(1—*Incomplete Transaction.* R. paid to S. a certain sum of money for the purpose of taking up a mortgage held by B. on certain real estate, supposing S. to be the duly authorized agent of B. S. negotiated with B. for a settlement of the mortgage and secured an arrangement by which it should be paid and canceled. B. produced the note but S. declined to pay the money without the mortgage. The amount agreed upon was deposited in the bank with the note to be paid upon delivery of the mortgage. A few months later B. died without delivering the mortgage and the money deposited was withdrawn by S. *Held*, that the transaction was incomplete and that the representatives of B. were entitled to the note and mortgage and that neither S. nor R. had any right to interpose in the matter.

(2—*Priority of Mortgages.* Evidence to defeat the priority of a mortgage recorded previous to one bearing an earlier date, tending to prove that the second mortgage had notice of the first mortgage, not recorded, and was acting as agent for the party subsequently seeking to foreclose it, must establish such knowledge and relationship beyond question. Circumstances creating suspicion are not sufficient.—*ED. LEGAL NEWS.*)

SCRIBNER, J.

On the 6th of March, 1893, the plaintiff, Amelia Bardshar, as administratrix of the estate of her deceased husband, Solomon Bardshar, instituted proceedings in the Court of Common Pleas of this county upon a note and mortgage, executed to her deceased husband, during his lifetime, on the 9th of November, 1887, by the defendants, John and Joseph Holtzman. The mortgage to secure the same was executed by the defendant John Holtzman alone, the note was signed by John Holtzman, alone and the mortgage also appears to be signed by John Holtzman alone. Somewhere in the course of the proceeding, I will probably come upon it as I proceed, Joseph Holtzman's name appears in connection with the transaction. The mortgage was executed by John Holtzman upon certain property, described in the proceeding as twenty-two and one-half acres, lying in the south half of the north half of lot 13, Catawba Island township, except five acres in the west end of the twenty-two and one-half acre tract, now owned by John Burgdorfer. The petition charges the payment to the executor and avers there is now due to the administratrix of Solo-

mon Bardshar, \$452.70, with interest from 1893; that this mortgage was filed on the 15th day of November, 1888, and that Joseph Holtzman, Henry Ritter and Phoebe J. Schemoneck, defendants, have or claim some interest by way of mortgage on the premises. The petition avers that whatever interest the said Phoebe Schemoneck had, has been fully satisfied and that whatever interest said Ritter or Joseph Holtzman had was subordinate to the plaintiff's lien. The interest of Phoebe Schemoneck does not appear.

John Holtzman filed an answer and cross petition on the 25th of April, 1893, and he says that on the 5th day of March, 1892, he sought to convey to one Edward Roehrs eight acres of land, before described covered by the mortgage, and also the right of way along the line of the said twenty-two and one-half acre tract. He avers that Roehrs is a necessary party; that as a part of the consideration of said sale to him, said Roehrs assumed and agreed to pay the note and mortgage set forth in the petition. He further avers that at that time, to-wit, the 5th day of March, 1892, Geo. E. St. John was the authorized agent of Bardshar, since deceased, authorized to collect the mortgage money for the recovery of which the action is brought; that on the 5th day of March, 1892, Roehrs paid Bardshar through St. John, the sum of \$400 in full of the amount then due. The answer and cross-petition of Holtzman then proceeds: "John Holtzman, this defendant, claims a lien upon said real estate in the sum of \$400, as part of the purchase money thereof and prays judgment accordingly."

Edward Roehrs, to whom Holtzman says he conveyed the eight acres, and whom, as Holtzman insists, was to pay the mortgage debt of Bardshar's, answers on the 22d of November, 1893, and he says that on or about the 5th day of March, 1892, he paid to Bardshar, through Geo. E. St. John, who was then his agent, the full amount of the promissory note sued upon and accrued interest. Bardshar's administratrix replies to this on the 15th day of May, 1893, and denies that St. John was the agent of Bardshar to collect the amount due upon the note and mortgage and set up in the pe-

tition, and denies that on March the 5th, 1892, or at any other time, Roehrs paid Bardshar through St. John the sum of \$500, as the full amount of the principal and interest then due on said note or any other sum whatever, at any time to apply on or to release said mortgage; denies all knowledge of the sale of Holtzman to Roehrs, or that Roehrs agreed to pay said note and mortgage, or that Bardshar was in any manner a party to said agreement, or that any part of said note and mortgage has been paid. And Bardshar, as administrator, also replies to the answer of Edward Roehrs, December 14 1893, and denies each and every allegation therein contained.

It appears by the testimony bearing upon this branch of the case as between Bardshar's estate and Holtzman and Roehrs, that some negotiations were carried on by and between St. John and Bardshar, then in full life, by which St. John was endeavoring to secure a purchaser to make a purchase and secure a transfer of the Bardshar note for \$420, and it further appears in the testimony uncontradicted in the case, that Roehrs had, as a point of fact, by some arrangement, placed in St. John's hands \$400, with which to take up that note.

According to St. John's testimony, which is confirmed by Cashier Zollinger of Sandusky, St. John met Zollinger at The Third National Bank of Sandusky some few months before Bardshar's death, and a considerable discussion took place between them upon the subject of the sale or the surrender of the note to St. John for the sum of \$400. According to the testimony, there was a good deal of hesitancy on the part of Bardshar and a good deal of disinclination on his part to accept less than the sum of \$420—the interest making the \$420, there being some arrears of interest accumulated on it; but the testimony shows that Bardshar finally agreed to accept the \$400; he had the note with him but he didn't have the mortgage, and St. John refused to pay the money of accept the note until the mortgage was also placed in the hands of the cashier of the bank, or in his hands. In order to complete the transaction, Bardshar, it would seem, finally consented to look up the mortgage and bring it in and deposit

it with Zollinger and when he had done so, Zollinger was to deliver him Mr. St. John's check for \$400. The check and note were pinned together and placed in charge of Zollinger. But Bardshar never brought in the mortgage, never consummated the transaction. The note and mortgage executed by St. John remained in the bank for perhaps two or three months and finally, the transaction never being completed, Mr. St. John went to the bank and lifted his check and destroyed it, leaving the note there without asking to control it or claiming any right or interest in it. It seems by correspondence produced that after the death of Bardshar, St. John renewed his application for the note and mortgage. The letters were addressed to Mrs. Bardshar, administratrix, requesting papers to be produced, but no attention was ever paid to this request, and the note and mortgage remained in her hands as administratrix, after the death of her husband, and it is upon this that this suit is brought by her.

Now, regarding the transaction detailed by the testimony as to the sale of the note and mortgage to Mr. St. John, neither Mr. Bardshar nor his representatives were entitled to the check for \$400, until he or they produced the mortgage and the transaction was not complete or consummated until the mortgage was produced. Bardshar had no right, was not authorized to lift the check until he thought proper to produce the mortgage, and we cannot view the transaction as otherwise than incomplete and not consummated, and that at the death of Mr. Bardshar under the conditions then existing, he must be regarded and his representatives must now be regarded as entitled to the note and mortgage and that neither St. John nor Mr. Roehrs, who, it seems, he was acting for, have any right to interpose in the matter.

Another issue is made between the estate of Bardshar and one Henry Ritter. He files his answer and cross-petition in the case on the 10th day of March, 1893, and says that on the 20th day of January, 1888, John and Joseph Holtzman executed and delivered to Geo. E. St. John, their promissory note of that date for \$2,000, at three years after said date, with interest at seven per cent. per annum payable annually, the note being

payable to the order of Mr. St. John. That, on the same date, to secure the payment of the note, the defendant, John Holtzman, executed and delivered to said St. John, his mortgage on the premises described—twenty-two and one-half acres, excepting five acres hereafter described.

Said mortgage was duly left for record on the 24th day of January, 1888, at one o'clock P. M., and was duly recorded on that date, securing said note in the usual form. On the 26th of January, 1888, for a good and valuable consideration, St. John sold said note to defendant Henry Ritter, and at the same time assigned and transferred to him the said mortgage and he has ever since remained and still is the owner and holder thereof. The amount is unpaid and he claims an account for the amount due and for judgment and general relief.

Now, the administratrix of Bardshar answers this cross-petition on the 24th of November, 1893, and says that she admits the execution and delivery of the mortgage described in Ritter's answer and cross-petition, and avers that the mortgage was taken by St. John at a date later than the Bardshar mortgage, with full knowledge on the part of St. John of Bardshar's mortgage and that it was unpaid. The second mortgage was taken and placed upon record with fraudulent intent to prefer the same to the mortgage given to Bardshar. Plaintiff is informed, believes, and charges that at the time of the execution of the second mortgage to St. John, he was the duly authorized agent of defendant, Henry Ritter, to whom said mortgage was immediately assigned, that the money paid by St. John to the said John Holtzman was the money of Ritter placed in the hands of St. John for the purpose of taking said mortgage, with full knowledge on the part of Ritter of the Bardshar mortgage, and the further averment is made that Joseph Holtzman is ample security for said note.

Henry Ritter replies to this answer of the Bardshar administratrix denying explicitly and emphatically the allegations therein contained. He says that for reply to the answer of Amelia L. Bardshar, administratrix, he has no means of knowledge whether the allegation that his mortgage was taken by the said Geo.

E. St. John, and he therefore denies the said allegation, and denies that the said second mortgage was taken by St. John and placed upon the records by St. John with fraudulent intent, etc. (reading the whole reply).

Now, under the denials contained in this reply and the material allegations contained in the answer of Mrs. Bardshar and of Mr. Ritter, it devolves upon the administratrix to show, by a preponderance of the evidence, that St. John did take this mortgage as the agent of Ritter, and with knowledge on his part of the existence of a former mortgage and that it was given as the purchase money, or that Ritter himself had such knowledge at the time he took the mortgage.

Now, we are unable to find testimony in the case to establish the claim on the part of the administratrix of the Bardshar estate that Ritter had any knowledge of the existence of this mortgage of Bardshar's, or that St. John was acting as the agent of Ritter in taking that mortgage. In fact St. John testifies, of course thereby admitting that he had knowledge of the Bardshar mortgage, that it was agreed between him and Bardshar, when he took his mortgage, that his mortgage should have priority over the Bardshar mortgage. That is the direct, positive testimony of St. John upon that point, that Bardshar agreed with him when he took the mortgage and afterwards transferred it to Ritter, that that mortgage should go upon record before the Bardshar mortgage was placed upon the record, and that testimony on the part of St. John is not contradicted by any evidence in the case. Of course, it could not be very well contradicted, because Mr. Bardshar is deceased, and there is no one to speak for him in the matter; but independently of that, Ritter flatly denies that St. John was acting as agent, and the testimony in the case does not establish that St. John was acting as Ritter's agent. If it appears from the evidence in the case that St. John was the agent of Ritter in that transaction and that thereby his knowledge was the knowledge of Ritter's why, unquestionably, from the doctrine of the courts, Ritter would be bound by St. John's knowledge. But, we are unable to find

from the testimony before us that St. John was acting in that capacity, although there are circumstances in the case which tend to excite suspicion in that regard. The fact that St. John shortly after transferred it to Ritter and the fact that Ritter, upon receiving it, paid him over the money, as would appear in the case, would create the suspicion that St. John in taking the mortgage, was acting for Ritter. But the proof is not such as would warrant us in finding that St. John was filling that relation. The result is that the decree will here be substantially the same as in the Court of Common Pleas.

The following charge to the grand jury, delivered recently at Valparaiso, Ind., by Judge John H. Gillett, of the Circuit Court, instructing them to make a thorough investigation of the riots at Hammond during the recent strike against the Pullman company, will be of interest, as it shows the attitude the courts are assuming with respect to that class of lawlessness. The court said:

"I would be recreant in my duty if I omitted to call your attention to the acts of violence and lawlessness that occurred in this county during the late strike. While the acts of wrong doing were directed principally at railroads, yet as an incident of such acts, men were beaten almost to death because they performed their duties, while others were compelled on pain of death to flee the state because they were suspected of having given information as to the identity of wrong-doers. There can be no question as to the abstract right of a man not only to strike, but also to secure the co-operation of his fellow workmen in a strike by entreaty or by an appeal to reason.

To take from the laboring man the right to quit an employment of uncertain tenure and to solicit others so employed to do so, is to take from him his only weapon, inasmuch as he is ordinarily without any considerable accumulation of money or property and he must make the value of his services felt speedily or the gaunt wolf of starvation will compel him to accept such wage as his employer tenders. The limit is that the striker must not molest the person or the property of his employer,

and must not interfere with the freedom of those who are content to accept as a compensation what the employer offers. It is clear that there can be no justification for mob rule under a new form of government like ours. Our citizens, both native and naturalized, must be educated to respect the law. No one has a greater reason than the laboring man to demand the enforcement of the law against those who have committed violence in the name of labor. The particular cases I wish you to specially investigate are those where individuals have been injured and not for crimes committed against the property of the railroads unless a request is made to do so."

It appears from a statement from the Court in a recent lunacy case that "if a person is insane on one subject he is certifiably insane." This is rather alarming. It was said by Hartley Coleridge of Miss Martineau, when her diligence and enthusiasm were compared with his own laissezaller ways, that she was "a monomaniac about everything"; an unusual charge indeed, but, on the other hand, everybody is supposed to be mad about something or another, and therefore, it seems, is qualified for a lunatic asylum. The case in question, it must be admitted, looked very serious, for it was that of a young solicitor suffering from religious scruples—"A professing Christian," as some one has expressed it, "who was a practicing attorney." He thought it wrong to sue anybody for debt, and "used to insist upon making the strictly legal charges." Altogether, he must have been an embarrassing partner when entrusted to settle costs. His counsel said, "You thought him hyper-conscientious; a serious matter, no doubt, for a solicitor." There were "roars of laughter" of course, but how strange it is that one branch of the law should have the audacity to gird at the other, on which it relies for subsistence.—*Illustrated London News*.

Among our exchanges we find what is probably the latest guide to the hilltops. It is called the "Secret of Success," composed, prepared and edited by F. E. Mitchell and published in New York. Typographically the publication commends itself and a hasty glance at its pages reveals the fact that the author or editor has mined into some of the rugged characters of the world for his "Secrets of Success." The work is aimed at the universe, having no special reference to any profession, business or trade.

INJUNCTION AND ORGANIZED LABOR.

A paper read before the American Bar Association, at Saratoga, N. Y., August 22 1894, by Charles Claflin Allen, of St. Louis, Mo.

SINCE THE subject of this paper was selected, and work upon it begun, history has been making with startling rapidity. Events have tripped upon the heels of events. The phases of the law have changed with the variety and celerity of the kaleidoscope, the essential elements remaining the same, and the appearance depending upon the angle of reflection.

It is unnecessary to give a definition of "Organized Labor." Its existence is too patent, its manifestations too evident, to require amplification. The term covers like the numberless local trades unions of small membership and the vast combinations of wage-earners claiming membership in the hundreds of thousands. The question for consideration is the application of injunction and the rules of equity procedure to these masses of men, under conditions which threaten irreparable injury to private property, and interference with the rights of the public; a question of the most vital importance at the present time, and one which it is impossible to approach without the gravest sense of its momentous consequences.

The whole scope of human law is summed up in the first definition of Justinian's Institutes: *Justitia est constans et perpetua voluntas ius suum cuique tribuendi.*(1) It is not obedience to command, nor the servile fear of disobedience, but the constant and perpetual wish of rendering to every man his right, that makes justice.

Equity, like its Roman prototype, *Arquitas*, has always manifested a tendency to approximate the ideal conception contained in Justinian's definition. Its appeal to the conscience of the chancellor demonstrates its origin in a moral force, not found in the rigid rules of the common law; and the highest expression of equity jurisprudence is found in its first and foundation maxim, *ubi ius ibi remedium*.

"Equity, then, in its true and genuine meaning," says Blackstone, "is the soul and spirit of all law; positive law is construed, and rational law is made by it. In this equity is synonymous to justice; in that, to the true meaning and sound interpretation of the rule."(2) Such a system should command the profoundest respect of all American lawyers. Its prerogatives should be strenuously maintained, its jurisdiction jealously guarded.

Injunction is "the strong arm of equity." With it the Court of Chancery reaches out to stay irreparable injury, and to draw within its grasp those who disobey its mandate. "A writ of injunction," says Mr. High, "may be defined as a judicial process, operating *in personam*, and requiring the person to whom it is directed to do or refrain from doing a particular thing. In its broadest sense, the process is restorative as well as preventive, and it may be used both in the enforcement of rights and in the prevention of wrongs. In general, however, it is used to prevent future injury rather than afford re-

dress for wrongs already committed, and it is therefore to be regarded more as a preventive than a remedial process. If the injury be already committed, the writ can have no operation to correct it, and equity will not interfere for purposes of punishment, or to compel persons to do right, but only to prevent them from doing wrong."(1)

The application of injunction and equity procedure to aggregations of workmen involves the solution of intricate and perplexing problems. Jurisdiction in such cases is based, first, upon criminal conspiracy; and second, upon injury to property resulting from such conspiracy.

A criminal conspiracy has been defined to be: "Any combination between two or more persons to accomplish an unlawful purpose, or a lawful purpose by unlawful means." The books, from the earliest days, are full of reiterations of this definition.(2) Hawkins, in his *Pleas of the Crown* (bk. 1, chap. 27, § 2), lays it down that "there can be no doubt but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law; as where divers persons confederate together by indirect means to impoverish a third person."

In an anonymous case in 12 Modern, 248 (case 427, 1698), leave was given to file an information against several plate button-makers for combining by covenants not to sell under a set rate, and Chief Justice Holt said: "It is fit that all confederacies by those of a trade to raise their rates, should be suppressed."

In *Bolton's Justice* (vol. 2, p. 16), it was declared that any such conspiracy is an offense at common law.

So in 1 Keble, 650 (report of *Rex v. Sterling*), Chief Justice Hyde says that the very conspiracy, without an overt act, to raise the price of pepper or other merchandise, is punishable. It will be noticed that these cases relate to those engaged in trade; yet they are cited as leading authorities in support of prosecutions against laborers for combinations to raise wages, as our own "Anti-Trust" Law is first invoked against strikers.

But the most notable illustration of the biblical assertion that "there is no new thing under the sun" is found in the *Liber Assissarum*, 27 Edw. III 138, 139, five years after the first of the "Statutes of Laborers," where, among other conspiracies directed to be investigated by the inquests of office, is that "of merchants, who by covin and alliance among themselves, in any year, put a certain price on wools which are to be sold in the country, so that none of them will buy, or otherwise pass in the purchase of wools beyond the certain price which they themselves have ordained to the great impoverishment of the people."

More than five hundred years ago our English ancestors were faced with the problem of "Trusts" and legislated against them. Whether

(1) High on Injunctions, pp. 2, 3.

(2) *Foulterer's Case*, 9 Co. Rep. 55 b; *Timberley v. Childre*, 1 Siderfin, 58 (1683); *Higgins v. Best*, 1 Balkeld, 174; 2 Lord Raymond, 1167 (1706); *Rex v. Kippneraley & Moore*, 1 Strange, 193 (1716); *Rex v. Cope*, 1 Stra. 144; *Rex v. Mawbey*, 6 T.R. 686 (1796); *The People v. Frequier*, 1 Wheel. Crim. Cas. 148 (1883); and nearly all the cases on conspiracy contain substantially the same definition.

(1) Inst. Justin. Lib. I, T. 1 (Ed. Sandars, p. 85).

(2) 3 Black. Comm. *446.

the inquest of office was more successful in 1354 than 1894 history is silent.(1)

But the leading case on common-law conspiracy is *The King v. Journeymen Tailors of Cambridge*, 8 Mod. 11, whose authenticity has been so much disputed; where the rule is declared that "a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them, to do if they had not conspired to do it." (2) This case, in turn, cites as its authority the mythical case of *Tub Women v. Brewers of London*, whose identity has puzzled the wits of advocates, judges and text-writers, but which is commonly believed to be the case of *The King v. Sterling*, 1 Keble, 650, in which certain brewers were indicted for conspiring to cease making small beer, and thus incite a riot and deprive the king of his excise.

The *King v. Journeymen Tailors of Cambridge* was decided in 1721, and has been frequently cited in English cases, (3) and the doctrine it laid down was the early rule in this country as applied to combinations of laborers. (4) The authenticity, and therefore the authority, of this ancient case raises an extremely perplexing question, namely, whether a combination among laborers to raise wages was a criminal conspiracy at common law. It is also an extremely important question, since if it was the common law, it is still the law in such states as have not adopted special statutes; and it is important for the further reason that even where other circumstances exist to establish a conspiracy, nevertheless the effort to raise wages is usually the foundation of the whole matter.

In the case of the boot and shoemakers of Philadelphia, tried in 1806, (5) and that of the journeymen cordwainers of the city of New York, in 1809, (6) and the Pittsburgh cordwainers, in 1815, (7) the doctrine of the journeymen tailors of Cambridge case was sustained, though its authenticity was strenuously denied by coun-

sel, especially in the New York case, with a degree of forensic learning, logic and wit rarely equalled. (1)

But in *Commonwealth v. Carlisle*, in 1821, Judge Gibson, of the Supreme Court of Pennsylvania, announced a different rule. (2) That case was *habeas corpus* brought by certain master shoemakers who had been convicted of a conspiracy not to employ journeymen except at a certain reduced rate, which however was the rate paid before the defendants had been compelled by a combination of journeymen to advance it. Judge Gibson declared that it had never been decided in England that it was unlawful for journeymen to agree that they would not work except for certain wages, or for master workmen to agree that they would not employ any journeyman except at certain rates. He further says: "The unsettled state of the law of conspiracy has arisen, as was justly remarked in the argument, from a gradual extension of the limits of the offense; each case having been decided on its own peculiar circumstances, without reference to any pre-established principle."

Judge Daily, in *Master Stevedore's Association v. Walsh*, decided in 1867, (3) approves the views of Judge Gibson, and criticises at length the correctness of the Cambridge tailors' case as an authority. Other judges of high standing have done the same. (4)

So far as the English cases are concerned, it cannot be doubted that the shadow of the statutes of laborers hung over all them; statutes which, from 1350 to 1825, in ever-varying form but never-varying severity, placed the laborer under compulsions and restrictions which permitted him little of the semblance of a free agent. Great doubt surrounds the whole subject of common-law conspiracy, and that point of view is well expressed by Mr. Justice Stephen in his work on the Criminal Law of England, (5) where he says:

"1. No case has ever been cited in which any person was, for having combined with others for the raising of wages, convicted of a conspiracy in restraint of trade at common law before the year 1825. There is indeed one case, that of the journeymen tailors of Cambridge, which may, perhaps, be an authority the other way, but this appears doubtful.

"2. There are some *dicta* to the effect that such combinations would be unlawful. The most important of these is the *dictum* of Grose, J., in *R. v. Mawbey*: 'In many cases an agreement to do a certain thing has been considered as the subject of an indictment for a conspiracy, though the same act, if done separately by each individual without any agreement among themselves, would not have been illegal. As in the case of journeymen conspiring to raise their wages, each may insist on raising his wages if he can but if several meet for the same purpose it is illegal, and the parties may be indicted for a conspiracy.' This *dictum* is an illustration not necessary to the decision of *R. v. Mawbey* and founded as it seems to me upon the case of the Cambridge tailors. I must add that I am quite unable to understand why, if all combinations to raise wages were at common law indictable conspiracies, it should have been considered necessary to pass the long series of acts already referred to. These acts are not

(1) Anti-monopoly laws are of ancient origin. By the *Lex Julia de Annona*, the Romans prohibited, under penalties, any interference with transportation, or preventing the free carriage of grain. By the statute of Zeno, the man who run a "corner" in staples was subject to banishment and confiscation of goods. 2 Wharton Crim. Law (9th Ed.), § 1894. Monopolies were prohibited at common law, and combinations in restraint of trade are held to be conspiracies. See *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173 (1871); *Hooker v. Vandewater*, 4 Denio, 349, and cases cited. For distinction between monopoly and rivalry, see *Mogul S. S. Co. v. McGregor*, L. R., 23 Q. B. D. 598 (1889), on appeal of *s. c.*, 21 Q. B. P. 544. Also, *U. S. v. Patterson*, 55 Fed. Rep. 605; *Stanton v. Allen*, 5 Denio, 434; *Salt Co. v. Guthrie*, 35 Ohio St. 696; *Craft v. McConoughy*, 79 Ill. 346; *Richardson v. Buhl*, 77 Mich. 638; 43 N. W. R. 1102; *Handy v. Railroad Co.*, 31 Fed. Rep. 689; *Western Union Tel. Co. v. Burlington & S. W. R. Co.*, 11 Fed. Rep. 1; *Dolph v. Machinery Co.*, 25 Fed. Rep. 533; *People v. Chicago Gas Trust Co.*, 130 Ill. 384; 22 N. E. R. 798; *Manly's Co. v. Klotz*, 44 Fed. Rep. 721; *More v. Bennett* (Ill. Su.), 29 N. E. Rep. 588.

(2) See also *King v. Edwards*, 8 Mod. 320, 321; *Re v. Eccles*, 3 Doug. 337 (1783).

(3) The doctrine was discussed in *Re v. Hammond & Webb*, 8 Kep. 719; *Re v. Salter*, 5 Esp. 153; *Re v. Bykerdike*, 1 Moody & Robinson, 179 (1832); *King v. Eccles*, 1 Leach, 254; 3 Doug. 337; *Re v. Ferguson*, 2 Starke, 431; *Re v. Bunn*, 12 Cox C. C. 216; *Re v. Drutt*, 10 Cox C. C. 592; *Re v. Mawbey*, 4 Term. R. 619. See *Cogley on Strikes and Lockouts* (1894).

(4) *T. e Boot and shoe Makers of Philadelphia* (1806), pamphlet printed at Philadelphia; *People v. Melvin*, 9 Wheel. Crim. Cas. (N. Y.) 267, or *The Case of the Journeymen Cordwainers of the City of New York*, *Yates' Select Cases*, 111 (1809); *Journeymen Cordwainers of Pittsburgh* (1815), pamphlet; *Com. v. Carlisle*, *Brightley's Rep.* (Pa.) 36 (1821); *State v. Buchanan*, 5 Harris & Johnson (Md.) 317 (1821), where the subject is fully discussed, with numerous citations; *People v. Tregulier*, 1 Wheel. Crim. Cas. (N. Y.) 143 (1823); *The Journeymen Tailors of Philadelphia*, pamphlet (1827); *People v. Fisher*, 4 Wend. (N. Y.) 1 (1836). See *Cogley on Strikes and Lockouts*, p. 6.

(5) Pamphlet printed at Philadelphia in 1806.

(6) *Wheel. Crim. Cas.* (N. Y.) 253; *s. c.*, *Yates' Select Cases*, 111.

(7) Pamphlet.

(1) See arguments of Sampson and Colden for defendants, in the *Journeymen Cordwainers' Case*, *Yates' Select Cases*, 1190 et seq.

(2) *Commonwealth v. Carlisle* (1821), *Brightley's Rep.* 34.

(3) 3 Daily (N. Y. Com. Pleas), 1.

(4) See opinions: Chief Justice Shaw in *Com. v. Hunt*, 4 Metc. 111 (Mass.); Recorder Rees, in *Journeymen Tailors of Philadelphia*, pamphlet, 1827; Chief Justice Williams, in *Hartford Carpenters' Case*, Sup. Court of Conn., printed in Hartford, 1828. Judge Taft of the Superior Court, Cincinnati, in *Moore & Co. v. Bricklayers' Union*, No. 1, 23 Weekly Law Bulletin, 48 (1899); and others.

(5) 3 Stephen's Hist. of Crim. Law of Eng., p. 206, et seq.

in their form declaratory, nor do they even assume that contracts between workmen for the purpose of raising their wages are illegal, in the sense of being void, and so incapable of being enforced by law. On the contrary, they enact that they shall be void. Sir W. Erie observes that whilst the ancient statutes 'were in force they tended to prevent a resort to the common-law remedy for conspiracy.' The inference from the existence of the statutes appears to me to be that until they were passed the conduct which they punish was not criminal.

"On the other hand the cases and *dicta* to which I have referred explain the undoubted fact that in the year 1825 an impression prevailed that a combination to raise wages would constitute an indictable conspiracy at common law."

Again he says (p. 219):

"The views of Crompton, J., and Lord Campbell, Ch. J., on the subject of conspiracy in restraint of trade, are thus expressed. Crompton, J., in *Hilton v. Eckersley*, 8 E. & B. 53 (1856), said: 'I think that combinations like those disclosed in the pleadings in this case were illegal and indictable at common law, as tending directly to impede and interfere with the free course of trade and manufacture.' His chief authority for this proposition was the *dictum* of Grose, J., in *R v. Mawbey*, referred to above. Lord Campbell, on the other hand, after referring to this *dictum*, and stating that 'other loose expressions may be found in the books, to the same effect,' says, 'I cannot bring myself to believe without authority much more cogent, that if two workmen who sincerely believe their wages to be inadequate should meet and agree that they would not work unless their wages were raised without designing or contemplating violence or any illegal means for gaining their object they would be guilty of a misdemeanor, and liable to be punished by fine and imprisonment.' The result is that the three judges of the Court of Queen's Bench each took a different view of the law on this subject, and that the six judges of the Court of Exchequer Chamber took a fourth view, which excused them from pronouncing an opinion on the question whether such conduct as Lord Campbell described was at common law an indictable conspiracy or not."

Mr. Wright, in his work on Criminal Conspiracy (pp. 36 to 52), and Mr. Carson, in his appendix to that work (p. 178), express similar views, though Mr. Carson does not seem to adopt the broad conclusions of Mr. Wright against the existence of conspiracy at the common law.

Unquestionably, the long and almost unbroken line of judicial declarations in America since the case of *Commonwealth v. Carlisle* in 1821 supports the doctrine that it is not unlawful for workmen to agree that they will not work, except for certain wages; that they are free to work for whom they please, or not to work if they so prefer, and that it is not criminal for them to agree together to exercise this right.⁽¹⁾

Nevertheless, the common-law rule of conspiracy is usually quoted with approval in the cases on this subject.⁽²⁾ The difficulty is not so much with the rule as with its application.

The opinions in support of the right of combination to raise wages are often only *dicta* of the judges, in actions for damages, bills for injunctions, or indictments for conspiracy, where conspiracy is found to exist because of the intimidation, violence or boycotts which are the common accompaniments of strikes in the concrete.

In the midst of the uncertainty about the application of the common-law rule, one proposition is plain, viz.: that where the confederacy is established, either at common law or under statutes, the gist of the offense is the conspiracy itself, and not the acts committed under it. Or to differentiate the rule: Where the conspiracy is to effect an unlawful purpose, the purpose only is required to be pleaded and proved; where the conspiracy is to effect a lawful purpose by unlawful means, it is necessary to plead and prove the means employed.⁽¹⁾ This is in compliance with the well-established rule that whatever constitutes the crime must be clearly charged.

The advent of fraud, force or intimidation into the conditions of a combination marks the vanishing point of doubt. Every man has the legal right to pursue his vocation without molestation, free from violence, intimidation or threats of injury to his person or his property. This right is an essential element of liberty under a free government, and it is a paramount obligation of government to protect him in that right.

The employer still has the right in law to employ whom he pleases, and the laborer to work for whom he pleases. To interfere with either by violence or threats is a crime, and a combination for such a purpose is a criminal conspiracy.⁽²⁾

Mr. Carson sums up the decisions thus: "The result of all the cases, ignoring matters of detail or special circumstances, appears to be as follows: Workmen may combine lawfully for their own protection and common benefit; for the advancement of their own interests, for the development of skill in their trade or to prevent overcrowding therein, or to encourage those belonging to their trade to enter their guild; for the purpose of raising their wages, or to secure a benefit which they can claim by law. The moment however that they proceed by threats, intimidation, violence, obstruction or molestation, in order to secure their ends; or where their object be to impoverish third persons, or to extort money from

[1] *Journeyman Tailors of Philadelphia*, pamphlet, 1827; *Hartford Carpet Weavers*, Connecticut, pamphlet, 1826; *Com. v. Hunt*, 4 Metc. 111 (1842); *Boston Glass Manufactory v. Binney*, 4 Pick. 425; *Bowen v. Matheson*, 14 Allen, 499; *Master Stevedores Ass'n v. Walsh*, 3 Daly, 1 (1867); *Carew v. Rutherford*, 106 Mass. 1 (1870); *U. S. v. Kane*, 23 Fed. Rep. 748, 1889; *State v. Stewart*, 59 Vt. 273, 1887; *Moore & Co. v. Bricklayers' Union No. 1*, 23 Weekly Law Bulletin, 48, 1890. This idea is usually assumed, argued, by judges in the later cases. See especially cases in the U. S. courts, cited *infra*. The marked change of sentiment and law on this subject can be noted in Mr. Wharton's treatment of it. Compare *Whart. Crim. Law*, 6th ed., p. 78, § 2322, 1868, and 9th ed., p. 215, § 1366, 1903.

[2] On the subject generally of conspiracy, see English cases: *Poulter's Case*, 9 Co. Rep. 55 b; *Regina v. Best*, 1 Balk. 174; *S. C.*, *Shebborne v. Oliver*, 13 Law Times Rep. N. S., 686, 1898; *Skinner v. Kitch*, 10 Cox C. C. 483, 1867; *Reg. v. Shepherd*, 11 Cox C. C. 326, 1869; *Reg. v. Hibbert*, 13 Cox C. C. 28, 1875; *Reg. v. Bauld*, 13 Cox C. C. 282, 1876; *Reg. v. Bunn*, 13 Cox C. C. 316, 1877; *Hilton v. Eckersley*, 8 E. & B. 53, 1856.

ers of Pittsburgh, pamphlet, 1816; *Com. v. Carlisle*, Brightley's Rep. Pa. 36, 1821; *State v. Buchanan*, Md. 5 Har. and Johns, 57, 1821; *Com. v. Judd*, 2 Mass. 329; *The Journeymen Tailors of Philadelphia*, pamphlet, 1827; *People v. Treguer*, 1 Wheel. Crim. Cas. 142, 1823; *Lambert v. The People*, 9 Cowen, 578; *People v. Fisher*, 14 Wend. 9; *S. C.*, 28 Am. Dec. 508, 1885; *Com. v. Hunt*, 4 Metc. 111, 1842; *State v. Norton*, 3 Zab. 23 N. J. L. 33, 1850; *State v. Pullis*, 12 Minn. 164, 1856; *State v. Donaldson*, 32 N. J. L. 3 Vt., 151, 1867; *Carew v. Rutherford*, 106 Mass. 1; *S. C.*, 4 Am. Rep. 297, 1870; *Master Stevedores Ass'n v. Walsh*, 3 Daly, 1, N. Y. Com. Pleas, 1867; *Mapstick v. Range*, 9 Neb. 390; *S. C.*, 31 Am. Rep. 415, 1879; *People v. Wilkig*, 4 N. Y. Crim. Rep. 408, 1866; *People v. Kostka*, 4 N. Y. Crim. Rep. 425, 1866; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. Rep. 48, 1887; *State v. Stewart*, 59 Vt. 273, 1887; *Pettibone v. Cus*, 148 U. S. 197, 1893; and other cases cited, *infra*, under *Boycotts and Injunctions*. But compare the peculiar case of *Cote v. Murphy*, Pa. 28 Atl. Rep. 190, 1894, where a combination of employers to reduce wages raised by the "artificial" means of labor organizations, was held not to be an unlawful conspiracy.

[1] *Com. v. Hunt*, 4 Metc. 111, 1842; *State v. Stewart*, 59 Vt. 273, 1887; and cases there cited, p. 287, *et seq.*; *Pettibone v. Cus*, 148 U. S. 197, March 6, 1893; *U. S. v. Hirsch*, 100 U. S. 33; and, generally, cases cited in next preceding note.

[2] See cases, English and American, cited *supra*.

their employers, or to ruin their business, or to encourage strikes or breaches of contract among others, or to restrict the freedom of others for the purpose of compelling employers to conform to their views, or to attempt to enforce rules upon those not members of their association, they render themselves liable to indictment." (1)

Boycotts are peculiarly within the pale of prohibition. Judge Seagle, of Pennsylvania, thus describes a boycott: "The word itself is a threat. In popular acceptance it is an organized effort to exclude a person from business relations with others by persuasion, intimidation and other acts which tend to violence, and they coerce him through fear of resulting injury, to submit to dictation in the management of his affairs." (2)

As frequently applied, it is one of most heartless and brutal manifestations of private revenge recorded in history, and it is calculated to call forth the abhorrence and just reprehension of all men who respect law and love liberty.

There may be an ideal boycott, as there is said to be an ideal anarchy, but the boycott of which the law takes cognizance is synonymous with conspiracy; for boycott is conspiracy. (3)

Wherever these elements of intimidation and violence enter into a combination, the law of conspiracy applies. It may be safely asserted that no adjudicated case holds the contrary. And the conspiracy being established, the acts of each in furtherance of its purposes, bind all. (4) Statutes have been adopted in a number of States, which greatly soften the rigor of common-law rule of conspiracy, and extend the privileges of organized labor in many ways; (5) but as their provisions vary, and their effect is local, lack of time prevents any consideration of them.

On the other hand, several States have adopted statutes against boycotts; and the tone of public sentiment as expressed through leg-

islation, generally, is clearly opposed to acts of violence or intimidation. (1)

The use of the writ of injunction as a preventive of unlawful aggressions by organized labor is of very modern application. The first case in point seems to have been *Springhead Spinning Co. v. Riley*, L. R., 6 Eq. 551, decided in 1868, in which the defendants, officers of a trades union, gave notice to workmen, by placards and advertisements, that they were not to hire themselves to plaintiff; and, as the bill alleged, this intimidated workmen, and seriously injured the value of plaintiff's property. On demurrer, it was held, that the acts of the defendants, as alleged by the bill, amounted to crime, and that the court would interfere by injunction to restrain such acts, inasmuch as they also tended to the destruction of property.

The court, through Vice-Chancellor Malin, reaffirms the well established doctrine that a Court of Chancery will not enjoin the commission of crimes, and that the function of equity is to protect the civil right of property. He refers to the opinions of Lord Campbell and Lords Justices Bruce and Turner in the famous case of *The Emperor of Austria v. Day and Kossuth*, 3 De G., F. & J. 232, 249, 253, and quotes from Lord Eldon in the celebrated case of *Macauley v. Shackell*, 1 Bligh (N. S.), 96, 127, where he says: "The court of equity has no criminal jurisdiction, but it lends its assistance to a man who has, in view of the law, a right of property, and who makes out that an action at law will not be a sufficient remedy and protection against intruding upon his publication." The conclusion reached by Vice-Chancellor Malin was, that "the jurisdiction of this court is to protect property, and it will interfere by injunction to stay any proceedings, whether connected with crime or not, which go to the immediate or tend to the ultimate destruction of property, or make it less valuable or comfortable for use or occupation."

No clearer or more satisfactory definition of equity jurisdiction in this class of cases has been, or can be, made. It recognizes the essential idea of equity jurisprudence that private rights of suitors, litigants in its forum, are to be protected. It will be noticed that there is no suggestion of the preservation of public rights, or the punishment of public wrongs. Even in the case of *The Emperor of Austria v. Day and Kossuth*, *supra*, there was no recognition of a jurisdiction to enforce political prerogatives or powers, and the court expressly declined to admit the existence of any such jurisdiction in equity. Said Lord Campbell in that case (p. 239): "I consider that this court has jurisdiction to protect property from an act threatened which, if completed, would give a right of action. I by no means say that in every such case an injunction may be demanded as of right, but if the party applying is free from blame, and promptly applies for relief,

(1) Wright on Criminal Conspiracies, Carson's Appendix to American Ed., 1887, p. 173.

(2) *Brace Bros. v. Evans*, Pa., 3 R. & Corp. J. 561, 1888.

(3) Ray's Contractual Limitations, 410, 411; Cogley on Strikes and Lockouts, 251; *Mogul S. S. Co. v. McGregor*, L. R., 15 Q. B. D. 476, 1885; *People v. Wilsig*, 4 N. Y. Crim. Rep. 403, 1886; *People v. Kostka*, 4 N. Y. Crim. 429, 1886; *State v. Glidden*, 55 Conn. 46, 1887; *Baughman v. Asken*, 11 Va. Law J. 196, 1887; *Com. v. Shelton*, 11 Va. Law J. 324, 1887; *Old Dominion S. S. Co. v. McKenna*, 30 Fed. Rep. 48, 1887; *Crump v. Commonwealth*, 34 Va. 927, 1888; *Brace Bros. v. Evans*, Pa., 3 R. & Corp. Journal, 561, 1888; *Sherry v. Perkins*, 147 Mass. 218, 1888; *Moore & Co. v. Bricklayers' Union No. 1*, 23 Weekly Law Bulletin, 48, 1890; *Casey v. Cincinnati Typographical Union No. 1*, 45 Fed. Rep. 141, 1891. *King v. Sterling*, 1 Keb. 649, was a case of boycott. The earliest recorded case was that of the *Balliffs of Shrewsbury*, in 1221, noted under the title, *Boycott*, in Vol. 1, Publications of the Selden Society, p. 115, *Pleas of the Crown*.

(4) *U. S. v. Kane*, 25 Fed. Rep. 748, 1885. See cases on conspiracy, generally.

(5) New York: Penal code, §§ 168, 170, 171; Pennsylvania: 3 Brightley's Purdon's Dig., p. 1172; Laws of Pa., 1891, p. 300; New Jersey: Supp. Revision, 774, § 30; Minnesota: 2 Stat. Minn., 1891, §§ 6092, 6093, 6094; Missouri: Rev. Stat. Mo., 1889, §§ 3780, 3781; Laws of Mo., 1891, p. 122; Laws of Mo., 1893, p. 187. Other states have passed acts modifying the common law in various ways. See also the act to Legalize the Incorporations of National Trades Unions, 1886, 24 U. S. Stat. at Large, p. 86, chap. 547; Statute on Arbitration, 1888, 25 U. S. Stat., p. 501, chap. 1643.

(1) Colorado: Mills' Ann. Stat. of Col., p. 923, § 1285, act passed in 1889; North and South Dakota: 3 Rev. Code of Dakota Terr., 1883, §§ 733, 734, of Penal Code; Illinois: Hard's Rev. Stat. of Ill., 1891, p. 471, § 46, act passed in 1887; Vermont: Rev. Laws of Vt., 1880, chap. 198, §§ 4286, 4287, act passed in 1867; Wisconsin: 3 San. & Ber. Ann. Stat. p. 2255, §§ 4460a and 4460b, act passed in 1887.

and shows that by the threatened wrong his property would be so injured that an action for damages would be no adequate redress, the injunction will be granted."

This basis for jurisdiction is an important one to bear in mind in following the history of injunction under later conditions.

The Springhead Spinning Company case did not lead to any development of the law of England as applied to labor problems. In 1885, Lord Coleridge, in *Mogul Steamship Co. v. McGregor*, L. R., 15 Q. B. D. 476, recognized the right of injunction, on the ground that a conspiracy on the part of shipowners to monopolize the China trade was an indictable offense, and therefore actionable, if private and particular damage could be shown; another illustration that the function of equity is the protection of private rights. "To warrant the court, however," says Lord Coleridge, "in granting an interim or interlocutory injunction to restrain the parties from continuing to pursue the objectionable course, those who complain must at least show that they have sustained, or will sustain, 'irreparable damage,' that is, damage for which they cannot obtain adequate compensation without the special interference of the court. It was an application of plaintiffs for an injunction to restrain the defendants from doing that which was called throughout the case—and which I really see no reason for hesitating to call also—boycotting the plaintiffs. It is admitted that this is a novel application; and although, certainly, that would not be by any means an insuperable objection, provided we saw that justice required us to exercise the power that is invoked, still it is a matter that is not to be disregarded." And on the facts of that case the injunction was denied.

It remained for the courts of this country to effect the evolution—is it too much to say the revolution?—of equity jurisdiction. In 1888, the cases of *Sherry v. Perkins*, 147 Mass. 212, and *Brace Bros. v. Evans*, 3 Ry. & Corp. Jout. 561, Court of Common Pleas of Allegheny county, Pa., were decided. In 1891, *Casey v. The Cincinnati Typographical Union*, No. 1, 45 Fed. Rep. 141, came before the United States Circuit Court, in Ohio. These were all cases of boycott, by solicitation, threats, parading with banners, issuing circulars and by other familiar boycotting devices, and in all three cases injunction was granted on the grounds of conspiracy and irreparable damage to property. These decisions seem to have been solely on the grounds laid down by the English judges, and in the *Typographical Union* case, Judge Sage said: "No case has been cited where, upon a proper showing of facts, an unsuccessful appeal has been made to a court of chancery to restrain a boycott. The authorities are all the other way." (1)

In 1892, in *Coeur d'Alene Consolidated and Mining Co. v. Miners' Union of Wardner*, 61 Fed. Rep. 260, Judge Beatty, in the United States Circuit Court for the District of Idaho,

granted an injunction against trespass by entering upon complainant's mines and by force, threats and intimidation preventing employees from working.

In his opinion, Judge Beatty says: "A wrong exists; rights have been infringed; unoffending citizens have been maltreated; the law has been overridden. May the courts be successfully invoked for restraining relief?" After discussing the logical results of permitting laborers to dictate to their employers in the management of their business, and recognizing the American doctrine right of men to work or not as they please, and at such wages as they please; to combine for lawful purposes and adopt all lawful means to advance their interests, he expresses his views as follows: "Unfortunately, combinations of labor are met by associations of employers, each trying to baffle what it deems the aggressions of the other. It is to be regretted these opposing forces have in late years gone so far in their efforts for supremacy that they now operate upon the principle that their interests are antagonistic. It is when these contests become so heated that violations of the law, the peace of the community, and the destruction of life and property are threatened, that the courts are compelled to interfere."

By this he means, of course, that courts of equity are compelled to intervene. Here is the entering wedge of the "public rights" idea as a function of equitable jurisdiction. From this time progress is rapid.

Blindell v. Hagan, 54 Fed. Rep. 40, in the United States Circuit Court for the Eastern District of Louisiana, was a suit for injunction against a combination of persons who were preventing ship-owners from shipping a crew. This seems to have been the first attempt to invoke the aid of the "Anti-Trust" Law. Act 1890, 20 St. p. 209. Judge Billings, however, in an opinion filed February 9, 1893, held that only the government could bring injunction suits under the act, and refused a writ upon statutory authority; but the court took jurisdiction under the general power of equity to prevent a multiplicity of suits, and granted the injunction. He reaffirmed the time-honored rule, that "there can be equity jurisdiction only when the case in question belongs to one of the recognized classes of cases over which equity has jurisdiction." On appeal the decision was affirmed by the Circuit Court of Appeals, the court adopting the opinion of Judge Billings, *locum verbis*. (2)

On April 3, 1893, Judge Taft rendered his decision in the celebrated *Ann Arbor* case. (3) He applied the powers of equity to compel the defendant railroad companies to, fulfill their duties under the Interstate Commerce Act to furnish equal facilities to connecting companies. The injunction was held by him to extend to the agents and servants of the defendants; under the rule in equity that agents and servants were bound by the injunction on the ground that their acts were the

(1) *Casey v. Cincinnati Typo. Union*, No. 1, 45 Fed. Rep. 141 (1891); citing *People v. Wintz*, 4 N. Y. Crim. Rep. 448; *People v. Kosciusko*, 12 129; *Com. v. Sheehan*, 11 Vt. Law J. 231; *Stade v. Glendon*, 8 Atl. Rep. 599; a. c. 55 Conn. 44; *Reg. v. Barrett*, 12 Law J. 420.

(2) *Blindell v. Hagan*, 54 C. C. A. 29; s. c., 54 Fed. Rep. 40, affirmed July 20, 1893, U. S. Cir. Court of Appeals, Fifth Circuit.
(3) *Toledo, A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 220, Circuit Court, N. D., Ohio, W. D., April 3, 1893.

acts of their employer. Mr. P. M. Arthur, Chief of the Brotherhood of Locomotive Engineers, being subsequently made a party, was enjoined from ordering a strike, and by mandatory injunction was required to rescind his order already given, calling into force a rule of the Brotherhood, which produced a boycott by all of its members, against the road on which the strike existed. This rule Judge Taft declared, when called into use, effected a conspiracy to commit a crime under the statutes of the United States, accompanied by irreparable damage to the complainant railroad company.

The opinion displays great legal acumen, learning and almost irresistible logic. Yet it is noteworthy that in this case a mandatory injunction, which by the rules of equity, as Judge Taft himself states, is of unusual application, was issued on preliminary motion, *ex parte*, under a special statute passed for the regulation of railroads in the interest of the public, against one not originally a party to the proceedings, who is not a common carrier subject to the provisions of the act, nor the agent or servant of any such common carrier. To this may be added the question, whether the statute, in expressly providing various remedies, legal and equitable, for persons affected by its violations, including injunctions under conditions not existing in the Ann Arbor case, does not preclude the remedy in that case, under the rule, *expressio unius, exclusio alterius*?

Underlying the whole case is the idea of an invasion of public rights. The statute imposes on the railroad company a public duty: the omission to perform that duty is a crime; Mr. Arthur, though not under any affirmative obligation to perform the public duty, conspires to prevent its performance; Mr. Arthur is guilty of a crime; irreparable damage results to the public as well as to the complainant; therefore Mr. Arthur is enjoined. This is the logical analysis of the Ann Arbor case.

After all, the gravamen of the case is the crime, which is an offense against the public, of conspiring to injure the public. In the light of Judge Jenkins's injunction in the Northern Pacific case, it is interesting to note, in passing, the views of Judge Taft concerning the right of employees to quit their service. "They may avoid obedience to injunction," he says, "by actually ceasing to be employees of the company; otherwise the injunction would be in effect an order to them to remain in the service of the company, and no such order was ever, so far as the authorities show, issued by a court of equity. It is true that if they quit the service of the company in execution of Rule 12, in order to procure or compel defendant companies to injure the complainant company, they are doing an unlawful act, rendering themselves liable in damages to the complainant if any injury is thereby inflicted, and that they may be incurring a criminal penalty as already explained, but, no matter how inadequate the remedy at law, the arm of a court of equity cannot be extended by mandatory injunction to compel

the enforcement of personal service as against either the employer or the employed." (1)

Throughout his opinion, Judge Taft nowhere in terms refers to the invasion of public right as a *ratio decidendi*. But Judge Jenkins in the now famous Northern Pacific case, takes his stand squarely on that platform. (2)

There the injunction was not granted on original bill by complainants, but on petition of the receivers, in aid of the receivership; in itself a remedy not usual in practice, because the appointment of the receiver is supposed to draw with it all necessary power to protect the property in the custody of the court, without the application of injunction, which is a separate form of remedy.

On motion to modify the decree, Judge Jenkins says: (3)

"The railway is a great public highway. Its primary duty is to the public. In the interest of the public it must be kept a going concern, although it prove unremunerative to the shareholders. Bondholders and shareholders invest their money in view of the public nature of the enterprise. The rights and interests are subordinated to the public duty charged upon the road. And so also employees in entering the service, assume obligations coextensive in kind with that of the corporation. They may indeed sever their relation in a proper and decent manner, but they may not legally resort to obstructive methods to compass their demands. Their rights—as the rights of bondholder and shareholder—are subordinate to the rights of the public, and must yield to the public welfare."

Here is the culmination of the "Public Rights" conception; the speedy fruition of the seed. And that without any necessary reference to statutory authority. But the progress of events is not yet complete.

By the act of 1890, commonly known as the "Anti-Trust" Law, (4) it is provided that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

The second section prohibits monopolizing any part of trade or commerce among the States or with foreign nations. Penalties are imposed for the violation of any of the provisions of the act.

By the fourth section, the attorney-general is authorized to institute proceedings in equity to prevent and restrain violations of the act.

The statute was first enforced in the case of *The United States v. The Workingmen's Amalgamated Council of New Orleans*, 54 Fed. Rep. 994, where Judge Billings, in an opinion filed March 26, 1893, held that injunction would lie under the provisions of this act, against the

[1] *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. Rep. 730, at page 743; citing *Stocker v. Brockenbank*, 3 Mac. & 250; *Johnson v. Shrewsbury*, R. Co., 3 De Gex, M. & G. 914; *Frederick v. Bishop of Ely*, 2 Y. & C. C. 347; *Lumley v. Wagner*, De Gex, M. & G. 604.

[2] *Farmers' Loan and Trust Co. v. Northern Pac. R. Co.*, 5 Fed. Rep. 303, Circuit Court E. D. Wisconsin, April 6, 1894.

[3] Page 813. The power to punish for contempt for interference with property in the hands of receivers has been frequently exercised. See *U. S. v. Kane*, 23 Fed. Rep. 748, 1885; *In re Little*, 23 Fed. Rep. 54, 1885; *In re Washburn R. Co.*, 24 Fed. Rep. 217, 1885; *In re Higgins*, 27 Fed. Rep. 443, 1886.

[4] U. S. Stat. at Large, chap. 647, p. 309, approved July 2, 1890.

draymen of New Orleans, through whose strike the whole business of New Orleans was paralyzed, and the transit of goods from State to State and to foreign countries was entirely interrupted. This view is supported by a *dictum* of Judge Speer, of Georgia, in a receivership case. *Waterhouse v. Comer*, 55 Fed. Rep. 149, April 8, 1893. About the same time, Judge Putnam, of Boston, in a case before him (*U. S. v. Patterson*, 55 Fed. Rep. 605, February 28, 1893) of merchants charged with a violation of the act, said: "It is not to be presumed that Congress intended thus to extend (*i. e.* to strikes and boycotts) the jurisdiction of the courts of the United States without very clear language. Such language I do not find in the statute."

Thus stood the adjudicated law when the preparation of this paper was undertaken. Since then what changes have been wrought. The great "Pullman boycott" and "sympathy strike" of the American Railway Union have come and gone. The strike has passed into history, but what an intricate mass of juridical problems it has left behind it to be solved. Of these, none are more vital or more far-reaching in their consequences than those which envelop the court of equity.

The attorney-general of the United States, acting for the United States in the exercise of its sovereignty as a nation, has sued out injunctions in nearly every large city west of the Allegheny mountains.

Injunction writs have covered the sides of cars, deputy marshals and Federal soldiers have patrolled the yards of railway termini, and chancery process has been executed by bullets and bayonets. Equity jurisdiction has passed from the theory of "public rights" to the domain of political prerogative. In 1888, the basis of jurisdiction was the protection of the private right of civil property; in 1893, it was the preservation of public rights, in 1894, it has become the enforcement of political powers. Even if the foregoing conclusions seem too broadly stated, it must nevertheless be plain to every equity practitioner that, between the Springhead Spinning Company case and the Chicago "omnibus bill" there has been an immense change in the application of injunction to large bodies of men, as well as in the grounds upon which the courts assume jurisdiction.

The Springhead Spinning Company case applied to comparatively few individuals, all of whom were probably known to the complainants in the bill, and enjoined their interference with the property of a single proprietor.

The Chicago "omnibus bill" was filed to prevent interference with twenty-three great railroad systems, and the injunction issued against several members of the American Railway Union, by name, as well as many thousand unnamed; and, to prevent a possible confusion of identity in the defendants, it was further directed to "all other persons whomsoever."

Whatever may be thought of the explanation given for this great change, it is surely within the bounds of safety to assert that the history of equity jurisprudence furnishes no precedent

in which the chancellor has called out the military in aid of an injunction writ.

It would be indelicate, as well as presumptuous, to enter upon a discussion of the application of the "Anti-Trust" Law to strikes and boycotts, at a time when the whole matter is pending in the courts under most sensitive conditions. It may not however be improper to question the wisdom of the executive department of the government in calling into effect, at a time of great public stress and excitement, a statute which had never been interpreted by a court of last resort, and which had received constructions directly in conflict from courts of coordinate jurisdiction.

What is the purpose of issuing injunctions against great masses of men? What object is to be attained by making two hundred, or even five hundred strikers parties to a suit, out of a total number of many thousands? Personal service on more than a few, in time to make the writ effective, is impracticable. Is it intended that the mere issuing of the writ should act *in terrorem* over the entire body of men engaged in the strike? Or is it expected, by posting copies in public places, to establish a novel method of service by publication? Is the decree to serve the purpose of a mere executive proclamation, warning evil-doers against a continuance of their misconduct, and without force or validity, except as a basis for invoking the military power? Surely not. Such a construction would be a degradation of judicial process. Then what conclusion remains, unless it be that the real purpose is to use the injunction for calling forth the power of the court to punish for contempt; to make a court of equity in practical effect a criminal court? This is a phase of the question that calls for the serious consideration of bench and bar. It is well known to all lawyers that courts of equity have not now, and have not had for five centuries, any jurisdiction over crimes. Once only, for a brief period, and under temporary conditions, Chancery assumed a limited jurisdiction in criminal cases. In the dark days of the fourteenth century, under Richard II, when lawlessness was rampant, and the courts of law were overawed by force and violence, the Court of Chancery exercised a species of criminal jurisdiction for the protection of the poor and helpless against the rich and powerful.⁽¹⁾ If equity is now to punish crimes at the instance of the government, under conditions which result in benefit to the railroads, will some one be heard to say that it is only an instance of history repeating itself?

Perhaps in retrospect, in the cold light of history, the incidents of this summer may bear a different aspect; but in the glow of the present, the inevitable logic of events tends to prove that the most powerful, if not the primary reason, for invoking the remedy by injunction was the summary power to punish for contempt which lies behind it.

Undoubtedly this is the common opinion of the bar as well as the public.

The press reports Judge Woods as saying immediately after he had issued the "omnibus" injunction at Chicago, that the marshal

1, 1 Spence's Equitable Jurisdiction, 212, et seq.

would be expected to enforce it, and if he was unable to do so, the troops of the United States could be called out. "It is unnecessary," adds Judge Woods, "to issue an injunction to prevent interference with the mails, as such interference is itself a crime for which the guilty party can be arrested and indicted. It is more necessary to issue a restraining order to prevent interference with interstate commerce. The only reason for issuing an order at all is that it is a means of meeting the present emergency, for the process of arrest and indictment is slow."⁽¹⁾

Twenty-four hours later the press despatches carried to the world the information that one of the Federal judges had united with the district attorney and the special counsel for the government in a call on the attorney-general for troops.⁽²⁾

These reports may be inaccurate. Judge Woods may not have said what he is reported to have said, and may have said nothing at all on the subject. The truth or falsity of the newspaper statements is immaterial. The fact remains a matter of public notoriety that the troops were called out to aid in the enforcement of equity process.

Punishment for contempt of court is the most summary and arbitrary exercise of authority under the English and American judicature. It is the reserve power inherent in every court of general jurisdiction to punish by fine or imprisonment, in order to maintain its dignity, and enforce its command;⁽³⁾ a power which is absolutely essential to the proper conduct of courts of justice.

"The exercise of the power lies solely in the discretion of the judge before whom the contempt is committed, and will not be examined or re-examined by any other court, except when the proceedings are so grossly defective as to be void. The only other remedy, according to the English and more generally received American doctrine, for any error, injustice, abuse of discretion, oppressive or corrupt conduct on the part of the judge of a court of the superior order, is by resort to an impeachment before the Legislature."⁽⁴⁾ The deprivation of this authority would render the courts impotent; its misuse would make them tyrants. It is therefore equally important to preserve the power and to prevent its abuse.

The person charged with contempt is entitled to be heard, but he must appear in person and not by attorney. He has no right to be heard by counsel, nor to trial by jury.⁽⁵⁾ And the trial of facts for contempt not committed in *facie curiæ* is usually on affidavits.⁽⁶⁾ While in contempt of an injunction, he cannot move to dissolve, nor can he attack the jurisdiction of the court under the original bill, nor file any sort of dilatory pleading whatever, till he has purged himself of the contempt.⁽⁷⁾ In short, a party to a suit may go to jail for con-

tempt of a preliminary injunction, issued *ex parte*, without notice to defendant, which is subsequently—and after the defendant has served his term of imprisonment—held to be without equity—that is, void. There is a tremendous power to place in the hands of one man; for from his judgment there is no appeal.

Extend this idea further. It is a general rule, as old as equity jurisprudence, that persons not parties to the bill are not bound by the decree.⁽¹⁾ This is also the law of procedure in the United States courts by statutes,⁽²⁾ and by rules of court.⁽³⁾ It is a practice in equity of long standing to make injunction writs run against defendants, their agents and servants, and the agents and servants are bound by the injunction, after they have notice of it, and are liable as for a contempt for a violation of its commands. This is solely upon the ground, according to the authorities, including Judge Taft in the Ann Arbor case, that the acts of the agents are the acts of the principals, the defendants.⁽⁴⁾ It would be difficult, if not impossible, to find any respectable authority, more than one year old, which holds the contrary, or substantially varies the rule as given. There is some authority for holding "aiders and abettors," under certain circumstances, where the proof is clear of a purpose to violate general process, such as subpoena, or summons to jurors, or to interfere with an officer of court;⁽⁵⁾ but this stands upon peculiar grounds, *quasi-criminal*; and it may be doubted whether the rule has ever been applied to injunction, which is a specific civil writ, directed in *personam*.

Furthermore, there is a common rule, that there must be service of the writ on those to be affected by it, which is usually held to mean personal service.⁽⁶⁾ Posting of printed copies of the injunction on freight cars, in railway stations, or other conspicuous places, is not a method of service prescribed by statute, by rules of court, or by general equity practice. The most that can be claimed for this method is, that it is a means of making notorious the issuance of the writ, and thus of aiding in proving notice in cases where notice is a factor in proof for specific cases. It is interesting to apply these propositions to the injunctions under discussion. So far as a careful investigation has disclosed, the writ issued by Judge

1. § Spelling on Extraordinary Relief, § 1128; *Barthe v. Larque*, 45 La. Ann. 131; *Johnson v. Von Kettler*, 66 Ill. 63; *Boyd v. State*, 19 Neb. 123, and cases cited, p. 134; *People v. Compton*, 1 Dur (N. Y.) 512.

2. Rev. Stat. U. S. (1873), p. 139, § 737.

3. See 3 Daniell's Chan. Pl. & Pr., p. 2395, Rules of U. S. Court, Nos. XLVII, XLVIII; or Rules as published in pamphlets.

4. *Toledo, A. & N. M. Ry. Co. v. Penn. R. Co.*, 54 Fed. Rep. 730; *Mexican Ore Co. v. Mexican Guadalupe Mining Co.*, 47 Fed. Rep. 351 (U. S. Cir. Court D. New Jersey, Sept. 3, 1891), where it was held that a director was not bound by the decree after resignation; *Lord Wellesley v. Earl of Mornington*, 11 Beav. 129; *People v. Compton*, 1 Dur. (N. Y.), 512 (1855); *Boyd v. State*, 19 Neb. 123 (1895).

5. Even a criminal indictment for impeding process must show notice. *Pettibone v. U. S.*, 145 U. S. 197 (1892). For distinction between criminal contempt of general process and contempt of special process, see opinion of Judge Thayer, in *Secor v. Singleton*, 35 Fed. Rep. 378 (378); citing *Hawley v. Bennett*, 1 Paige, 169; *Rap. Contemps.*, § 147; 3 High on Inj., 164 Ed. 1, § 164. Plaintiff in injunction proceeding may waive right to have act judged contempt. *Mills v. Cobby*, 1 Mer. 3; *Barfield v. Nicholson*, 3 Law J. Ch. 90; *Hull v. Harris*, 45 Conn. 544; 3 High on Inj. (2d Ed.), § 1450.

6. 3 High Inj., § 1452, p. 1193; 3 Daniell's Chan. Pl. & Pr. *169. And where the question of service is doubtful, a motion for attachment will be denied. *Squire Whipple v. Hutchinson*, 1 Blatchf. C. C. Rep. 190 (1858). See 3 Amer. & Eng. Enc. of Law, p. 790.

1. St. Louis Globe-Democrat, July 3, 1894.

2. St. Louis Globe-Democrat, July 4, 1894.

3. 3 Amer. & Eng. Encyclopedia of Law, pp. 795, 799, and cases there cited. See Rev. Stat. U. S., § 735, p. 137.

4. 3 Amer. & Eng. Enc. of Law, p. 799. See *In re Higgins* 27 Fed. Rep. 443 (1888), opinion by Judge Pardee, p. 444.

5. 3 Amer. & Eng. Enc. of Law, p. 793, and cases cited.

6. 3 Amer. & Eng. Enc. of Law, p. 799, and cases cited; 3 High on Inj., § 1452, p. 1193.

7. 10 Amer. & Eng. Enc. of Law, p. 777, et seq., and cases cited.

Jenkins in the Northern Pacific case was the first of its kind. It is a striking innovation, and marks the point of departure from what is understood to be the accepted equity practice. On this account it is deemed best to let it speak for itself. It was directed to thirty-two persons, by name, members of certain brotherhood committees, and to various others by classes. Omitting certain introductory and concluding parts, the body of the writ is as follows:

"Now therefore in consideration thereof, and of the matters in said petition set forth, you, the above named, and the officers, agents and employees of Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, and the engineers, firemen, trainmen, train dispatchers, telegraphers, conductors, switchmen and all other employees of said Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, and each and every one of you, and all persons, associations and combinations, voluntary or otherwise, whether employees of said receivers or not, and all persons generally, and each and every one of you, in the penalty which may ensue, are hereby strictly charged and commanded that you, and each and every of you, do absolutely desist and refrain from disabling or rendering in any wise unfit for convenient and immediate use any engines, cars or other property of Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as receivers for the Northern Pacific Railroad Company, and from interfering in any manner with the possession of locomotives, cars, or property of the said receivers or in their custody, and from interfering in any manner, by force, threats or otherwise, with men who desire to continue in the service of the said receivers, and from interfering in any manner, by force, threats or otherwise, with men employed by the said receivers to take the place of those who quit the service of said receivers or from interfering with or obstructing in anywise the operation of the railroad or any portion thereof, or the running of engines and trains thereon and thereover as usual, and from any interference with the telegraph lines of said receivers, or along the lines of railways operated by said receivers, or the operation thereof, and from combining and conspiring to quit, with or without notice, the service of said receivers, with the object and intent of crippling the property in their custody, or embarrassing the operation of said railroad, and from so quitting the service of the said receivers with or without notice, as to cripple the property or to prevent or hinder the operation of said railroad, and generally from interfering with the officers and agents of said receivers or their employees, in any manner, by actual violence, or by intimidation, threats or otherwise, in the full and complete possession and management of the said railroad, and of all the property thereunto pertaining, and from interfering with any and all property in the custody of the said receivers, whether belonging to the receivers or shippers or other owners, and from interfering, intimidating or otherwise injuring or inconveniencing or delaying the passengers being transported, or about to be transported, over the railway of said receivers, or any portion thereof, by said receivers, or by interfering in any manner by actual violence or threats, or otherwise preventing or endeavoring to prevent the shipment of freight or the transportation of the mails of the United States over the road operated by said receivers and from combining or conspiring together, or with others, either jointly or severally, or as committees, or as officers of any so-called labor organization, with the design or purpose of causing a strike upon the lines of railroad operated by said receivers, and from ordering, recommending, approving or advising others to quit the service of the receivers of the Northern Pacific Railroad Company on January 1, 1894, or at any other time, and from ordering, recommending, advising or approving by communication or instruct on, or otherwise, the employees of said receivers, or any of them, or of said Northern Pacific Railroad Company, to join in a strike on said January 1, 1894, or at any other time, and from ordering, recommending or advising any committee or committees or class or classes of employees of said receivers, to join in a strike on January 1, 1894, or at any other time until the further order of this court."

If it be said that the Northern Pacific decree was issued in furtherance of the general powers attaching in receivership proceedings, it must be remembered that it is not in form an order of course, but an injunction, and as such it must be interpreted. Otherwise it would be only a sort of open order of warning against violating the process of the court; a construction not consistent with its form or substance. (1)

In the case of *The United States v. Debs*, (2) known as the "Chicago Omnibus Bill," the injunction was issued July 2, 1894, and was directed against eighteen defendants by name, "and all persons combining and conspiring with them, and all other persons whomsoever." After lengthy recitals of acts which are enjoined, consisting of interference with United States mails and inter-state commerce, the decree concludes:

"And it is further ordered that the aforesaid injunction and writ of injunction shall be in force and binding upon such of said defendants as are named in said bill, from and after the service upon them severally of said writ by delivering to them severally a copy of said writ or by reading the same to them, and the service upon them respectively of the writ of subpoena herein, and shall be binding upon said defendants, whose names are alleged to be unknown, from and after the service of such writ upon them respectively, by the reading of the same to them, or by the publication thereof by posting or printing, and after service of subpoena upon any of said defendants named herein, shall be binding upon said defendants, and upon all other persons whatsoever who are not named herein from and after the time when they shall severally have knowledge of such order and the existence of said injunction."

The decree bears the signatures of the distinguished judges, William A. Woods and P. S. Grosscup.

It is interesting to note, in comparison with this, the decree issued by Judge Thayer of the United States court at St. Louis, in the case of *The United States v. Elliott*. (1) The bill was filed against one hundred and thirty-two persons named, which number was afterward increased by the addition of about two hundred and fifty more names. The decree, which was entered on the 6th of July, 1894, enjoined the defendants, "and all persons acting in concert under their direction and control," from the various acts recited, which were, with a few changes, the same as those mentioned in the Chicago decree. In conclusion, after specifying that the decree shall be binding on the defendants named, after personal service of the injunction and subpoena, it provides that the injunction "shall be binding upon said defendants whose names are not stated but who are within the terms of this order, from and after the service of such writ upon them respectively by the reading of the same to them or by the delivery of a copy thereof to them."

[1] See Report No. 1049, House of Representatives, 53d Congress, 2d Session; being report from the Committee on Judiciary June 8, 1894.

[2] U. S. Circuit Court, N. D. of Ill. [not yet reported].

[3] U. S. Circuit Court, E. D. of Mo., E. Div. [not yet reported].

It would, again, be manifestly indelicate to pre-judge or discuss the merits of cases against specific defendants now pending for judicial decision. Their determination must be left to the wisdom, learning and high sense of public duty which has always characterized the Federal judiciary. The forms are given as a necessary part of the history of this subject. They must bear their own construction to those who read them. It may not however be improper to ask the questions: Who are parties to these decrees? And are all persons whosoever liable for contempt?

Viewing the history of this subject, it is important to stop and take a reckoning. Where do we stand?

That the industrial forces of the country are in a state of fermentation no one can doubt. That there is a prevailing sentiment among the great mass of wage-earners that there are defects in the laws and their administration, is most apparent. The late "sympathy strike" is convincing evidence of this. Such a strike, in itself, seems incredible. It is incredible, except upon the theory of a widespread discontent. The tendency to concentration of labor forces increases constantly. Speaking from a sociological point of view, the organization of labor against the organization of capital is entirely natural. Power breeds tyranny, which in turn brings rebellion and opposition, then counter-forces produce a new tyranny. Prophets are not wanting in these days to tell of pending economic changes, and the High Priests of reform preach their panaceas. Whether the changes are to come through socialism, communism, anarchism or the single tax; or whether they are to come at all is not pertinent to the subject of this paper.

Nor has the American Bar Association any proper concern with sociology. But this association has an interest—the deepest interest—in jurisprudence and remedial procedure. From that standpoint it is one of its chief functions to meet and face the questions of the day.

One point concerning organized labor is plain. Under the existing system of jurisprudence, the laboring men have no right to expect recognition in the law for their organizations until they assume a responsibility commensurate with the privileges they claim. If organized labor is to contest with organized capital, it must have a legal status in some sort analogous to organized capital. If it is to make—and break—contracts; fix terms and conditions of employment; have a voice in the management of business, and dictate the classes of persons who are to be employed, it must have a legal entity which shall be able to respond in damages for its breaches of contract or its torts, and be subject to the restraining process of the courts on well-defined juridical lines.

After all, what does it mean, this sudden development of equity jurisdiction? Whither are we tending? An injunction sued out by the United States against ten thousand strikers and all the world besides. Did the injunction stop the strike? Troops were called out to aid the process. Did they aid it? Some

scores of rioters were killed, but where was the injunction meanwhile?

Was a single result achieved by the military which could not have been as lawfully and effectually accomplished without an injunction? The criminal laws are ample and severe, and the power of government to enforce them is limited only by the allegiance of its citizens. Every person who interfered with the United States mail, or conspired to violate the Inter-State Commerce Law, or destroyed property, or joined in riotous gatherings such as assembled at Chicago, was guilty of crime, and was subject to arrest and punishment. When the marshals were unable to enforce the criminal laws, there was just as much power to call out the military in aid of criminal process as there was in aid of injunction. Why, then, invoke the extraordinary jurisdiction of a civil court, never designed for, and in no way adapted to, such cases? The incident itself is a sad commentary on existing conditions. It points to the conclusion that the people are becoming afraid of their own institutions; afraid of trial by jury; afraid of the cherished guaranties of civil liberty derived through *Magna Charta* and enshrined in their constitutions, State and National.

The idea seems prevalent that there is nothing at issue except the question of domination between labor and capital. Men struggle and contest, and violate the laws for what they call "organized labor;" as if the term covered privileges of a higher order than the inherent rights of the individuals included in it, and of citizens. In aid of strikes and boycotts, they invoke the rule of law and morals that a man may place his labor where he pleases, at such wages as he pleases; but deny the same right to the men who take the places thus voluntarily made vacant. The principle upon which our national autonomy was founded, that all men are created equal, and are entitled by inalienable right to life, liberty and the pursuit of happiness, seems to be limited by recent interpretation to all men who belong to labor organizations.

Organized capital, in turn, by its violations of law, cultivates this class feeling. The efforts by large corporations to make use of injunction, with its punishment for contempt, tends to nullify the provisions of the Bill of Rights that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * * and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." The question at issue is deeper than any mere conflict of classes. The fundamental constitutional right of civil liberty is at stake, and every American is affected by any violation of that right. Upon the bench and bar, as the interpreters of the law, devolves the serious responsibility of applying those constitutional principles to the intricate warp and woof of social and political conditions.

In the discharge of this solemn obligation, a gentleman of the American Bar Association, it is for those who follow the noble profession of the law to determine, whether violations of the criminal law shall be prevented and punished through criminal or civil process, and whether the court of equity shall be so used as shall tend to make its decree of injunction on the one hand an instrument of tyranny; or, on the other hand, a mere *brutum fulmen*.

ABSTRACTS OF RECENT DECISIONS.

MARRIED WOMAN—Not liable for vicious dog. The liability of a married woman for a vicious dog on her premises, where her husband lives with her, is denied in Alabama in the case of *Strouse vs. Leipf*, 23 L. R. A. 622; but that some courts have held differently is shown by the annotation to the case on the responsibility of a wife for the use and safety of her premises.

DEED—Liability from acceptance. Whether or not a person by merely accepting a deed without signing it is bound to perform conditions contained in it is a question involved in *Hickey vs. Lake Shore and Michigan Southern R. Co.*, 23 L. R. A. 396, which holds the grantee to be bound. In a note to the case the authorities are collected and their lack of agreement shown.

LODGE MEMBER—Suspense of. The interference of courts with the authorities of a Masonic lodge to prevent the suspension of a member was invoked in *Mead vs. Sterling*, (Conn.) 23 L. R. A. 227, in which it is declared that the remedies afforded by the laws of the order must be first exhausted, although the Grand Master who is to try the question involved is also the complainant.

VACCINATION—Rule of school board requiring it is valid. The Supreme Court of Pennsylvania have held that the regulation of a school board, requiring pupils to be vaccinated before being admitted to the public schools, is a reasonable one, and its enforcement should not be interfered with by the courts. That whether or not vaccination is an effective preventive of disease is not a question to be passed upon by courts. As there is a difference of opinion on the subject among medical authorities, a school board must decide in the exercise of its discretion whether it will or will not, for the protection of the children under its care, exclude unvaccinated children from the school, and its discretion in this regard will not be interfered with by the courts.

STATE AGRICULTURAL SOCIETY—Liability for torts. That the Iowa State Agricultural Society, not being a corporation for pecuniary profit, but being organized for the advancement of the agricultural interests of the State, it is held in the case *A. Hern* against the society, 58 N. W. Rep. 1092, that its funds cannot be diverted to the payment of damages arising out of wrongful arrests by its officers and agents, such acts not being within the scope of the purpose for which the society was created.

APPOINTMENT—Void without notice. The appointment of a committee for a supposed lunatic without any notice to him is held absolutely void by the West Virginia case of *Evans vs. Johnson*, 23 L. R. A. 737; but the annotation shows the surprising fact that some courts have upheld such an appointment without any notice whatever to the person declared to be insane. This is the coolest kind of assuming in advance the very fact to be tried, and a clear denial of due process of law which is guaranteed by the constitution of the United States. An amazing thing also noticed in the annotation is that in various states, as in New York, the statute governing the proceeding makes no provision for notice to the party whose reputation and liberty are in question, but in many instances the courts have gone beyond the statutes and required such notice to be given.

INTERNATIONAL LAW—Changing fortunes of rival governments. The Court of Appeals in England has recently decided an interesting case in international law which recalls some of the decisions made over twenty years ago, when the United States Government endeavored to obtain possession of goods and money held in England by agents of the Confederate States. The case recently decided was that of the Republic of Chili against the London and River-Plate Bank. The bank had received silver to the value of about \$600,000 from President Balmaceda while he was at the head of the Chilian Government. The bank on the security of the silver paid its value to the agents of Balmaceda. Most of it was paid after Balmaceda had been defeated in battle and had resigned the Presidency. The counsel for the present Government of Chili argued that the bank should have known of the change of government, and should not have paid out the Government money to the agent of a deposed official. The English courts have held, however, that the bank was not required to pay attention to all the rumors relating to the changing fortunes of the rival governments, but it was authorized to pay the money until it received from some authoritative or official source information that the old government had been deposed and that the new government laid claim to the money.

THE BENCH AND BAR.

The official terms of thirteen Common Pleas Judges expire so that elections for their successor will be held this fall. In addition to this there are a few vacancies to fill.

"Silence in the Court!" thundered a Kentucky Judge, "Half a dozen men have been convicted already without the Court having been able to hear a word of the testimony."

Burke, the Irish Chief Justice, on being told that the Judges in the Court of Common Pleas had little or nothing to do, remarked, "Well, well, they're quite equal to it."—*The Brief*.

A colored man was on the witness stand and a judge asked him:

"Do you know what an oath is?"

"Yes, sah; when a man swears to a lie, he's got to stick to it."

Of six thousand actively practicing lawyers in New York City, eighteen hundred only may be classified as litigating attorneys. The others are counselors, title examiners, investment agents, whose business is outside of the court room.

Lawyers are now beginning to emerge from their vacation idleness, and to attend to the demands of court sessions soon to open generally throughout the state. Before long "At the Court House," will be placarded on many an office door.

The Judge asked an Irish policeman, "When did you last see your sister?" The policeman replied, "The last time I saw her, my lord, was about eight months ago, when she called at my house, and I was out." "Then you did not see her on that occasion?" The Irishman answered, "No, my lord, I wasn't there."

As the official term of Circuit Court Judges is six years, and each bench is composed of three Judges, elections to this position on the bench occur only each alternate year. This, however, is the election year, and a Judge will be selected in each district to succeed those whose terms expire February 8, 1895.

The following are the counties in Ohio in which Circuit Court sessions are to be held this month, September, and the time for opening each: Sept. 4th, Ashtabula; 11th, Fairfield; 17th, Franklin; 19th, Perry and Wyandot; 20th, Columbiana and Monroe; 24th, Washington; 25th, Marion and Richland; 26th, Carroll; 27th, Crawford.

The political campaign of this year, in Ohio, will be short and attorneys will be somewhat relieved of their perennial speech-making duties, as a silent campaign will be conducted in many counties.

Judge Jeremiah Black for a long time wore a black wig. On one occasion, having donned a new one, he met Senator Bayard, of Delaware, who thus accosted him: "Why, Black, how young you look! You are not so gray as I am, and you must be twenty years older." "Humph!" replied the Judge, "Good reason; your hair comes by descent and I got mine by purchase."—*The Green Bag*.

The legal mills, it may be said, will be fairly grinding, in Ohio, next week. Common Pleas Courts opened last week after the summer vacation, in four counties. This week sixteen more were booked as starters, six more for next week, and eight more for the following week. Before the month closes courts of this class will be in session in thirty-four of the eighty-eight counties, and lawyers should be reasonably happy.

It is said that educated women are more alive to the question of equality of rights in Russia, than in any other country. In the town of Torusk forty women are practicing law professionally and an equally large number in other cities of Siberia. So great has been the increase of female lawyers that the males are dissatisfied, and in some parts of the country steps are being taken, looking towards shutting out ladies from soliciting in courts.

Several eminent lawyers of Chicago have died within a few weeks. Burton B. Cook, who was one of the best known members of the Illinois bar from twenty to forty years ago, had retired from the active practice of the profession for several years. He was closely associated with President Lincoln before the war, and made one of the speeches nominating him for President at the Baltimore Convention in 1864. He was for many years the general solicitor of the Northwestern Railroad. Cyrus M. Hawley, who had been a judge of the Supreme Court of Utah over twenty years ago, and who was prominent in practice at the Chicago bar, died in his eightieth year at his home in Hyde Park. Norman L. Freeman, who had held the office of reporter for the Supreme Court for over twenty-one years, died at his home in Springfield. His work as a reporter is found in 120 volumes of the Illinois Reports. No other reporter, it is said, has published during his official term so many volumes of reports.

Ohio Legal News.

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We invite correspondence from lawyers in whose practice a knotty query has arisen, or novel position has been presented, and who desire to get comments or a solution of the difficulty from other members of the bar of the state. Questions of such a nature, or answers, will be welcome at all times.

We welcome inquiries from those who have prepared addresses on legal topics, or discussions upon points of interest, and who wish to have them published, either in the LEGAL NEWS, or in book or pamphlet form. Estimates are always cheerfully and promptly given upon all jobs concerning which we receive inquiry.

It is likely that many of our readers are not aware of the fact that we have one of the largest and most complete printing offices in the country, and do everything in the line of publishing, viz., printing, ruling, binding, engraving, electrotyping and lithographing. Our facilities enable us to do work at a very low price, and quickly. Consult us before giving out any job of size or importance.

An important decision of the Cuyahoga Common Pleas in the case of The Lake Shore & Michigan Southern Railway Co. v. the City of Cleveland, et al., concerning lake front property, is in our hands, and would have appeared in this issue, but was withheld in order to enable Judge Noble to review the proof before publication. His absence from home during the past week has made the delay necessary. We state this fact in order that our readers may know that we take pains to have the decisions we publish, revised and corrected by the court from which they are issued, before being printed. The case will appear in our next issue.

The Circuit Judges of Ohio met at Columbus on Tuesday. Judge Milton L. Clark of the 4th Judicial Circuit, was elected Chief Justice and Judge C. C. Shearer, of the 2d Circuit, Secretary.

We feel gratified at the kind reception the OHIO LEGAL NEWS has received by members of the bar who have seen a copy of the last issue, our first one. If the expressions of praise we received were merited, we shall, in the near future, be able to furnish a paper that will be satisfactory beyond question.

READ THIS.

Several new subscribers have been received through our offer of a copy of the Ohio Local and Special Laws, to all cash subscribers for a period of one year. We have also been asked if the offer applies to present subscribers, who renew for one year. It will until withdrawn, as we have no privileges we are not willing to bestow alike on all of our patrons. This volume is out of print, and can rarely be obtained except of us. Every lawyer should have a copy to complete his library. Three dollars gets the LEGAL NEWS for one year, and a copy of these laws. The edition is small and will soon be exhausted.

SUPREME COURT.

Special to OHIO LEGAL NEWS.

COLUMBUS, O., September 21, 1894—The Supreme Court will convene Monday, September 24th, after a vacation of about three months. Over one hundred new cases have been filed since the Court adjourned and with the already overcrowded docket, the question that has perplexed the bar of the state with reference to the length of time a case receives consideration, will not in any wise be removed. An oral argument assignment will probably be made the first of October. The last case regularly assigned for oral argument was No. 2446, but advanced cases have preference over other suits. The last call of the docket was up to and including No. 3075 and it is very likely that a call of the docket will be made also the first of next month and will include about seventy-five cases.

The following cases have been filed, within the last week, and motions, to be heard Thursday, September 27th:

FRIDAY, September 14th—No. 4192. The village of Uhrichsville, O., vs. Samuel C. Auld; error to the Circuit Court of Tuscarawas county. Helea & Green, Uhrichsville, O., attorneys for plaintiff; F. H. Soler, for defendant.

No. 4193. The village of Uhrichsville, O., vs. Nancy E. Mealy; error to the Circuit Court of Tuscarawas county. Same counsel.

SATURDAY, September 15th—No. 4194. The State of Ohio on the relation of Henry T. Fay vs. Robert M. Archibald, sheriff of Hamilton county, O. Mandamus. Thos. McDougall, for plaintiff, and Spiegel, Bromwell & Foraker, for defendant; all of Cincinnati.

No. 4195. The Gambrinus Stock Co. vs. Catharine M. Cook and Joseph S. Cook; error to the Circuit Court of Hamilton county. Follett & Kelly, for plaintiff; Outcalt, Granger & Hunt, for defendant; Cincinnati.

Jacob Weller vs. The State of Ohio. Motion for leave to file petition in error to the Circuit Court of Hamilton county. C. B. Simrall and Alfred Mack, for plaintiff; Dye & Dye, for defendant; Cincinnati.

No. 4196. Ammi W. Call vs. Peter F. Good, et al., error to the Circuit Court of Ashtabula county. Edward H. Fitch, Jefferson, for plaintiff; Theo. Hall, Ashtabula, for defendant.

MONDAY, September 17. Ernst Altschul vs. The State of Ohio. Motion for leave to file petition in error to the Circuit Court of Cuyahoga county. Kerruish, Chapman & Kerruish, Cleveland, for plaintiff; Clark & Thompson, Cleveland, for defendant.

TUESDAY, September 18. The State of Ohio vs. William R. Johnson. Motion for leave to file bill of exceptions to the Court of Common Pleas of Jefferson county. E. E. Erskine & Dio Rogers, Steubenville, for plaintiff. J. M. Jordan and James F. Daton, for defendant.

No. 4197. L. N. Means, et al. vs. Edward Clark, et al.; error to the Circuit Court of Hamilton county. S. A. Miller & C. D. Robertson, Cincinnati, for plaintiff; W. A. Hicks, S. B. Deal, H. B. Furrill and Spiegel, Bromwell & Foraker, Cincinnati, for defendants.

No. 4198. Sarah E. Boyer, et al. vs. Thomas L. Kintz and The Tiffin Savings Bank; error to the Circuit Court of Seneca county. Lutes & Lutes and Rohn & Baker, Tiffin, for plaintiffs; Seney & Sayler, Tiffin, for defendants.

WEDNESDAY, September 19th.—No. 4199. Geo. L. Kean vs. Georgia Phillips; error to the Circuit Court of Morgan county. Stewart & Harris and J. W. McElhinney, McConnellsville, O., and E. M. Kennedy for plaintiff. Defendant's attorneys not known.

No. 4200. Edson Wallace vs. Georgia Phillips; error to the Circuit Court of Morgan county. Same attorneys.

No. 4201. The Ohio Grangers' Mutual Insurance Co. vs. Edwin S. Holcomb and Mariela A. Holcomb; error to the Circuit Court of Ashtabula county. J. B. Burrows, Painesville, and J. C. Talcott, Cleveland, for plaintiff. Pinney & White, Jefferson, for defendant.

No. 4202. George L. Green vs. Wm. K. Thompson; error to the Circuit Court of Scioto county. T. C. Anderson, Portsmouth, for plaintiff and A. C. Thompson, Portsmouth, for defendant.

Three important points were adjudicated by the Supreme Court of the United States in *Scott vs. McNeal*, filed in May, 1894, and fully reported in N. Y. Law J., Sept. 14th. The first is, that the Supreme Court is not bound by the construction given to a state statute by a court of the state, when the question is, whether the statute provided for the notice required to constitute due process of law. The second is, that "the jurisdiction to grant letters of administration, conferred on Probate Courts by the code of Washington Territory, is limited, in the light of the common law and of other code provisions relating to the subject, to the estates of deceased persons," holding that "such a court has no jurisdiction to determine that a living man is dead and undertake to dispose of his estate," and that "its decision on the question whether he is living or dead cannot bind or estop him, or deprive him, while alive, of the title or control of his property." Third, that *prima facie* evidence of the death of a person, by presumption from his being absent and not heard of for seven years, on which a Probate Court may assume him to be dead and appoint an administrator of his estate, may be overthrown even in a collateral suit, by proof that he was alive at the time of the appointment of the administrator.

Ohio Circuit Courts.

(Sixth Judicial Circuit, Ottawa County. Present: Hons. C. S. Bently, P. J.; C. H. Scribner, and G. R. Haynes, J. J.)

REISSUE OF MORTGAGE.

MARY and HENRY VAN GLAHN, Plaintiffs, vs. PETER DUNHAM, Defendant. On error to the Court of Common Pleas of Ottawa County.

Re-issue of a Mortgage. Where a party who is the maker of a mortgage leaves it in such a position that it can be issued, or he himself issues it as a valid mortgage, after it has been paid, then between the mortgagor and any person who becomes the purchaser of that mortgage, the purchaser will hold the mortgage free from any defense.—ED. LEGAL NEWS.

HAYNES, J.

The case is brought here by petition in error filed by Mary E. Ewell, Geo. E. St. John, Sarah Dunham and J. J. R. Stevens, for the purpose of reversing a judgment rendered by the Court of Common Pleas, declaring that a certain mortgage that was set up in the answer and cross-petition of said Alice DeWitt, to wit: "In case it was not a lien on plaintiff's premises, mentioned in the petition."

Before passing to the merits of the case I wish to make some remarks about the condition of the pleadings. A petition was filed by Henry Van Glahn, setting up that he had a mortgage for \$875 upon certain premises which he describes in his petition. Part of the premises described by him—the premises described in the petition filed by Van Glahn are as follows: "The east part of the northwest quarter of the southwest quarter of section No. 12, township 12, range 15, containing 14 and 25-100 acres of land, situated in Carroll township, Ottawa county, Ohio." Also the west half (continuing the description). In the answer and cross-petition of Alice DeWitt, wherein she sets up her mortgage, she describes property as follows: "Situated in the township of Carroll, Ottawa county, Ohio, and known as being the northwest quarter of the southwest quarter of section 12," and also sets up the other 20 acres.

Now, it will be noticed that Van Glahn sets up an interest in the east part of the northwest quarter, while she sets up a mortgage on the whole of the northwest quarter, the fact being, as perhaps appears in the evidence, that she was the

owner of a half of that northwest quarter, while the other part of that northwest quarter belonged to Peter Dunham. Van Glahn sets up in his petition his mortgage, the date of it, the time of its record, and also sets up that Mr. Bense and Mrs. DeWitt claim some interest in the premises. Mrs. DeWitt, in her petition, sets up her mortgage and avers that it is the first lien upon the premises, giving the date of the execution of the mortgage and the date of its record. Now, Mary E. Elwell, as I have stated, owned half of the first portion of the described land and she and Peter Dunham have their joint answers, to plaintiff's petition amended; and for answer to the amended answer and cross-petition, Alice DeWitt adopts all allegations in the amended petition of the plaintiff Van Glahn, "as fully as though set out herein." The result of that is that they deny nothing in regard to Mrs. DeWitt, and the amended petition of Van Glahn makes no allegations that amount to anything, except that she claims a lien therein and that it was intended to be the amended answer of Van Glahn and the cross-petition of Mrs. DeWitt. I see the word "answer" is stricken out, and so far as the issues or the pleadings of Mrs. DeWitt are concerned, as between herself and Peter Dunham and Mary E. Elwell, they stand without any denial whatever, simply an affirmation of the petition of Van Glahn.

Henry Van Glahn, for his individual answer and cross-petition to their cross petition, is the same in fact. He sets up certain matters which shall appear hereafter and to that a reply is filed by Mrs. DeWitt.

The case upon the trial, so far as the journal entry is concerned and the judgment of the Court, which is found upon the issues joined between Van Glahn and Mrs. DeWitt, is that Mrs. DeWitt has no lien upon the premises set up in her petition. One-half of the 40 acres, as I understand it to be one-half of the northwest quarter of a certain section or portion that stands in the name of Mary E. Elwell, he nowhere describes in his petition, because no one makes a claim to the east half of it or that portion owned by Sarah E. Dunham; so that the finding of the Court upon that is upon the

issues of Van Glahn and Mrs. DeWitt, as there is no question as to whether the mortgage is paid or not. I come now to the case itself.

A bill of exceptions was taken and the evidence that was offered in Court is set out in full. From this appears, in order of time, that on the 16th day of December, 1889, Peter Dunham and his wife, and Mary E. Elwell and her husband, joined in a mortgage to one J. J. R. Stevens, wherein they conveyed the property that is set up in the cross-petition conveying this northwest quarter of the southeast quarter of section No. 12, or the whole of it to J. J. R. Stevens, for the purpose of securing a note of even date for the sum of \$450, payable three years after date with interest at 7 per cent., payable annually. Van Glahn claims a mortgage on the east part of the said northwest quarter of the southeast quarter of section No 12, and the other 20 acres by virtue of a mortgage executed by Peter Dunham and Sarah Dunham, his wife, on the 31st day of December, 1890, to Geo. E. St John, and which was by Geo. E. St. John assigned and transferred to Henry Van Glahn on the 13th day of January, 1891—it reads here 1890, but it should be 1891, but at the time waived demand and notice of non-payment and endorsed the note and made an assignment of the mortgage which I have read. The testimony shows that sometime prior to January, 1891, or December, 1890, Dunham being in debt somewhat, was desirous of borrowing more money and merging his debts all in one mortgage. He, or the parties, made application to Mr. Stevens (the note and mortgage was not yet due), asking him if he would be willing to take the money on his note and mortgage before the same became due, and he said he would, and thereupon, they made application to Geo. E. St. John—perhaps Dunham alone—in order to know if he could negotiate for them a loan and he expressed himself that he could, and thereupon, this note and mortgage was made and was afterwards sold to Van Glahn. Out of this money it was expected that this mortgage of Stevenson of \$475 would be taken up, and also a mortgage of Bense which was on the premises, and which was only a small amount due, perhaps \$60. The note and

mortgage of Stevenson not being paid and running along for some little time—just what time I don't know—he placed it in the hands of an attorney in this city for collection in order to receive the money. He notified the parties, Elwell and Dunham, that he had that note for collection and that it had not been paid yet, and, thereupon, they went to see St. John about the matter and St. John said he would take it up. The result was that they came together on the 16th day of May (I think it was in 1891), and at the office of Mr. Geo. E. St John in this village. The attorney, Mr. Love, when he took the note and mortgage from Mr. Stevens for collection had the note endorsed in blank by Stevens writing his name across it and also had Stevenson write his name upon the mortgage in blank. This was for the purpose, as stated at the time, so that if it was paid the mortgage could be canceled. So that when the parties met at St. John's office and the note was produced, and the mortgage, they each had upon the face blank endorsements of Mr. Stevens. Mr. St. John then drew a check for the amount of the note and mortgage to Stevens and delivered it to the attorney and the mortgage was left there. It is in controversy as to whether it was laid on the table or delivered to St. John in hand. St. John then said to the parties, there being present himself, Mrs. Elwell, and Mr. Dunham, that insomuch as there was this prior mortgage of Bense's on the property that he wished to keep that mortgage alive. Mr. Love had left at that time and Mrs. Elwell followed him and stated to him the matter and asked what should be done about it. She said St. John had said to her that if it was left with him he would endorse the note and mortgage upon this \$875 note and mortgage, and Mr. Love told her that if she did anything of that kind she should be sure that the endorsement was made. Some conversation followed so that Mr. Love returned with her to St. John's office and there a receipt was drawn up by Mr. Love, St. John saying that the \$875 note and mortgage were not in his possession at Port Clinton, but were in his box in the bank of Sandusky, and that he would make endorsement

when he saw the mortgage. This receipt reads as follows:

"May 16, 1891.

"Received of Mary E. Elwell and Peter Dunham \$494.60 (I think it is), being the amount of the Stevens mortgage and interest; amount to be credited or endorsed on the \$875 mortgage dated December 21, 1891." "Also to be endorsed 'interest paid to date, May 16, 1891.'"

And thereupon, having received this receipt, Mrs. Elwell left the note and mortgage in the possession of Mr. St. John. Thereupon, Mr. St. John (but not in the presence of the parties) made the following endorsement:

"May 16, 1891.

"For value received, I hereby assign the within mortgage to George E. St. John. J. J. R. STEVENS."

and had assignment recorded as follows:

"Assignment entered of record May 20, 1891.

"N. CLEMONS, Recorder."

On the note under the name of J. R. Stevens it is written near the top of the note "Payment guaranteed, George E. St. John." Shortly after that, the exact date I have forgotten, he made application to a gentleman by the name of Flynn, in Sandusky, for the purpose of selling the note and such arrangements were made at the time that Mr. Flynn bought it for Mrs. DeWitt. Mrs. DeWitt did not see the note but left it entirely with Flynn, who was acting as her agent. He, however, took measures to have an abstract of the title, and one was furnished him showing the condition of the property and mortgage which was purchased. But it showed on the face of the abstract that the mortgage of Mr. Flynn was the prior mortgage, excepting, perhaps, the Bense mortgage, and that it had been duly assigned to George E. St. John; and thereupon, he paid the amount of the mortgage, \$450, to St. John and took an assignment, which reads as follows:

"For value received, I hereby sell and transfer all my right, title and interest in this mortgage herein described to Alice DeWitt. GEO. E. ST. JOHN."

It was afterwards, or not until January 27, 1893, entered upon the records of this county, as it appeared by the endorsement of N. A. Clemons, recorder. Mrs. DeWitt continued to hold this note and

mortgage and there was paid upon it by St. John, or through St. John, interest to December 16, 1890; December 16, 1891, and to December 16, 1892, St. John being the guarantor of the note.

I believe now these are the leading facts in the case and the main issue that was tried before the Court, was upon the question as to whether the mortgage was paid and satisfied, or whether Mrs. DeWitt held it under such circumstances as would entitle her to hold as a lien upon the premises prior to the lien of Van Glahn. We think that this note and mortgage were left in the hands of St. John as a valid and subsisting mortgage—a live mortgage; that the understanding and agreement at the time was that he was to endorse upon the \$875 mortgage the amount of this first mortgage, \$450, reducing that mortgage to such an amount that the two mortgages would make an aggregate of \$875. St. John having this mortgage then in his possession as a live mortgage, as his own property, proceeded to sell it in the manner pointed out to Mrs. DeWitt. Now we are of the opinion under the law of the case, that in so doing, so far as Mrs. Elwell is concerned, that this mortgage of Mrs. DeWitt's is a valid and subsisting mortgage, at least upon the portion of the premises which was owned by Mrs. Elwell, which I understand to be the west part of the northwest quarter of the southeast quarter, after the lien of Bense upon the premises.

So far as the mortgage of Van Glahn is concerned, so far as the lien of this mortgage is concerned as between Mrs. DeWitt and Van Glahn, we think this mortgage must be postponed to the Van Glahn mortgage. The authorities are clear, that the mortgage is to take effect, as to subsequent mortgagees as of the date upon which the new transfer is made. We hold that Van Glahn's mortgage must be paid first out of that portion of the land belonging to Mr. Dunham, and that as between Mrs. DeWitt and Dunham, her mortgage is a valid mortgage next after the Van Glahn mortgage.

There is no doubt, we suppose, as between these parties, Elwell and Dunham and Stevens, that the note was paid. The note, however, has gone out upon the

market with his name on it, and with his name upon the mortgage, but then, his rights and liabilities made in that way are not before us. Yet, the authorities are clear, we think, that where a party who is a maker of a mortgage leaves it in such a position that it can be issued, or he himself issues it as a valid mortgage, after it has been paid, then between the mortgagor and any person who becomes the purchaser of that mortgage, the purchaser will hold the mortgage free from any defense.

It is said that Mrs Dewitt must stand in the shoes of St. John; we do not understand that principle applies in a matter of this kind. The person who purchased the mortgage has been guilty of no negligence in regard to the purchase; it was bought on the strength of this assignment and without any knowledge, at the time, that these transactions occurred on the 16th day of May, 1891, and, therefore, she becomes a *bona fide* purchaser of the notes and mortgage and is protected in a Court of Chancery.

The Court below having found that the mortgage was an invalid mortgage, the action being an action triable at law, and the case coming to us on error, the judgment of the Court must be that the judgment of the Court of Common Pleas must be reversed and the case remanded for further proceedings according to law.

(Sixth Judicial Circuit, Ottawa County. Present: Hons. C. S. Bentley, P. J.; C. H. Scribner and Geo. E. Haynes, J. J.)

UNAUTHORIZED COLLECTION.

ELIZABETH HITCHCOCK VS. MICHAEL KELLEY,
ET AL.

Authority to Collect Money. Collection without express authority or possession of the security held to have been unwarranted. Suit for foreclosure of a mortgage.

BENTLEY, J.

The petition filed in the Court of Common Pleas originally contained two counts and asked personal judgment upon the note and mortgage. The prayer for personal judgment was stricken out and the decree upon the mortgage simply asked. In view of the fact that some person must suffer in the case, one side or the other, perhaps it is proper to con-

gratulate the parties, that the amount here is rather small, being for the sum originally of \$200; and part of the interest has been paid.

The petition is in the ordinary form for the foreclosure of this mortgage for the principal of a note given by Michael Kelley on August 16, 1888, for \$200, and bearing 8 per cent. interest payable annually, and upon which interest is credited in the petition to August 16, 1892, it being averred that after the making and delivery of this note and mortgage to one Geo. E. St. John, it was, for a valuable consideration, assigned to the plaintiff in this action, who now seeks to foreclose the mortgage.

An answer was filed, and afterwards, probably on leave, an amended answer of Michael Kelley was filed in the case. He denies that he is indebted to the plaintiff in the sum of \$200, or in any sum whatever. Then, without reading the answer, it substantially sets up that upon the 9th day of June, 1891, he paid to Geo. E. St. John, the original mortgagee, the sum of \$150, which he says was in payment of the interest then due on the note described in the plaintiff's petition and in part payment of the principal.

That on the 9th day of December, 1891, he paid to said St. John the further sum of \$180, which sum was in full payment and discharge of the note described in said petition of the plaintiff, and the balance of the \$180 was to be applied on another note held by St. John against him.

The answer then avers, in substance, that at the time these two sums were paid to St. John he represented that he was then and there the owner of this mortgage and note, and that after the \$180 was paid, he would get it and deliver it up to the defendant, and that the defendant, at that time, believed that St. John was the owner of the note and mortgage.

The answer further states, in substance, that in fact, at the times when these two alleged payments were made, St. John was the agent of the plaintiff, Mrs. Hitchcock, entitled to receive and collect this money, and that he had, in fact, received this money as the agent of the plaintiff; and not only that, but that

at the time he received it he represented that he was still the owner of the note, and he therein and thereby was acting as the authorized agent of the plaintiff and instructed so to do. These allegations of the answer were denied in a reply and the issues were thus made up.

It will be noticed from the dates of these alleged payments, the note being for three years after its date, that at the date of the first payment, the note, by its terms, had not fallen due, but that at the date of the last payment of \$130, it had fallen due, the note being, as I have said, given in August, 1888, and running three years, falling due by its terms August 16, 1891, one of these payments being made in June, 1891, and the second in December, 1891.

The question presented by the testimony and evidence introduced was, first, whether these payments, or either of them, had in fact been made by Mr. Kelley; and, secondly, whether, if made, they were made to the agent of the plaintiff authorized to receive them at the time they were made.

Mr. St. John testified that these payments were made at the time set forth in this answer of Mr. Kelley, but Mr. Kelley, himself, though present in court, was not called upon to state the date nor the amount, nor the fact of these payments, though he was called finally in rebuttal of certain matters. But the greater controversy occurred over the question of the actual authority of St. John to receive these payments at the time he received them, as he says, for the plaintiff and as her agent. It is not claimed that at the time these payments were made, he had possession of this note and mortgage, in fact, the contrary appears, that about the time of this assignment of them they were delivered to Mrs. Hitchcock and remained in her possession, both the note and mortgage, and are still in her possession, or those acting for her; so that, when Mr. Kelley paid these amounts (presuming now that he had paid them), at these different times named, he paid them to St. John without requiring, as a condition of payment, that the note or mortgage should be there in order to have them credited on the note and mortgage, or to have the note and mortgage given up as paid

and canceled. There is no claim either in the pleadings or in the proof that Kelley in making these payments relied upon any agency of St. John for the plaintiff, because he said he didn't know anything about it, and, at least, the claim is that he did not know anything regarding that, and that he believed St. John was the owner of the papers at the time. There is no claim of any act or deed on the part of Mrs. Hitchcock at or before the time of these payments, which should have led Mr. Kelley to believe that St. John was the owner of the mortgage and the notes, or was acting as her agent, except that the assignment to her was not placed on record, and such testimony given by St. John as I will hereafter refer to in brief. In other words, the claim on behalf of Kelley must rest alone on the assumption and claim that Mr. St. John was actually authorized as her agent to receive this money at the time he did receive it, and that, although he did not have the note and mortgage, it would make no difference if, in fact, he was actually authorized to receive that money for her, and that, undoubtedly, is so. If he had the authority, the mere circumstance that he had not then the proof of it present or the usual *indicia* could not be conclusive, that matter being simply a fact or circumstance bearing on the question of the actual authority of the supposed agent. We think there is no testimony tending to show that Mrs. Hitchcock authorized Mr. St. John to say to Mr. Kelley, nor to any one, that he was the actual owner of this note and mortgage. She did not authorize him to make such a misstatement. The testimony by which the defendant seeks to make out this claim that St. John was the agent and had actual authority, rests wholly on the testimony of St. John, the plaintiff having been adjudged insane. The testimony of St. John, so far as it tends to show that he had this authority, shows that it came about in the way of a conversation had between him and Mrs. Hitchcock, or various conversations, some of which he says were, as he thinks, in the presence of Mrs. Lutz, a daughter of Mrs. Hitchcock, and some of which, he thinks, were when he and Mrs. Hitchcock were alone, and the question presented is whether, under all

the circumstances in this case, the proof offered is sufficient to make out the actual authority of St. John to do this business in this way. There was proof, however, to this effect, not only by St. John but by some others, that the husband of Mrs. Hitchcock died in the year 1881; that prior to that time Mr. St. John had transacted some business for the husband, the husband having some funds which he either loaned upon note or mortgage, or had Mr. St. John loan for him, and perhaps bought notes and mortgages. Upon his death the widow, Mrs. Hitchcock, began to transact this business. She had a number of thousands of dollars which she desired to keep invested in notes and mortgages in general, and Mr. St. John says that he transacted, almost wholly, the business for her; other evidence indicates that St. John did from that time on until the time that his comparatively recent troubles occurred, transact a large amount of business for her. Generally he transferred to her—sold to her, notes and mortgages which had been taken by him in his own name, sometimes, perhaps, he loaned money for her and took notes and mortgages, but whether at any time, in her own name, or always in his own name does not appear directly. It also appears that on several occasions Mr. St. John was employed by her in making out her returns for taxation; that he did so at her request; and perhaps it is sought to be inferred from that, that it was her purpose to avoid taxation as much as possible, and that St. John was employed to make out returns instead of her making them out herself, with a view, in part, to this result, and perhaps this testimony was relied upon to indicate the close relation in business between her and St. John. So far it is claimed that the purpose was to avoid taxation. It is to be noted that these returns were not introduced in evidence, and we have nothing to bear upon the subject save and except the presumption, in the absence of proof to the contrary, that a party makes the returns truthfully and properly according to law. The testimony also shows that on some occasion a party applied to Mrs. Hitchcock for the loan of some money—\$1,000, which she had, and that notwithstanding the rec-

ords had been searched by other parties, her relatives and good business men, and that she was assured that the loan was a proper one, yet she deferred making it until St. John, who was absent from the city, gave his advice upon it. But otherwise than this, the case on the part of the defendant rests upon the oral testimony of Mr. St. John, together with such evidence as is offered by a book which he brings into Court and papers showing a large number of transactions between him and Mrs. Hitchcock. The testimony of St. John bearing upon this question as to his direct authority to act, was, in substance, to this effect: That when he first began doing business for Mrs. Hitchcock in this way she told him that she wanted him to transact her business for her, attend to the loaning of money for her, and attend to the matters as if the transactions were his own, and that he might receive money from parties to whom loans were made, at any time, whether the obligations were due or not, in such sums as were offered, if he saw fit so to do, and that he should generally attend to the collection of her papers. He says that that conversation occurred at the beginning of his transacting business for her about 1881, and that other conversations, the terms of which he does not exactly repeat, but similar, in substance, he says, occurred from time to time after that. He says that from time to time he did this business for Mrs. Hitchcock; that he has generally sold her notes and mortgages, and, although he transferred the notes and mortgages to her in writing, the transfers were never recorded, and that he was in the habit of receiving pay upon or of them, sometimes when she had delivered them to him for payment, and when he had them in his possession at the time they were paid, and sometimes when he did not have the notes or mortgages in his possession, and that at such times when he received the money, having the securities in his possession, he would cross out the transfer to Mrs. Hitchcock when the mortgages were fully paid, and, as he himself was the original mortgagee, he would write the release of the mortgage and sign his own name, and that if that release were recorded it would be recorded in that way,

not showing any assignment; and sometimes, if he received the pay in his own office, and the securities were not in his possession, but were in the possession of Mrs. Hitchcock, he would take the money to her; pay it over to her and receive the notes and the mortgages, and sometimes in her presence or at her direction, at least, would cancel the assignment to her upon the mortgage and release it himself as the original mortgagee; and sometimes, he says, that these payments which were received by him when he did not have the papers, were upon instruments not yet due, and that he took the money up to Mrs. Hitchcock, and she would produce the papers and he would endorse the amount, if he had not paid in full, or would then receive from her the securities, if they were paid in full. He does not say that he had any special authority to collect the Kelley mortgage, but he speaks of it as if it came under this general manner of his doing business with Mrs. Hitchcock.

If this money was paid in June of 1891, it was never paid over to Mrs. Hitchcock, and the same is to be said of the payment of December, 1891. If St. John received it he did so either for himself or as the agent of Mrs. Hitchcock; he never paid it over to her; it has never been actually paid to her. First, as bearing upon the question of the actual payment; this was shown upon the trial. Shortly after Mr. St. John got into some financial troubles, Mr. Kelley applied to him to have these papers, and thereupon Mr. Kelley and Mrs. Kelley and Mr. St. John went up to see Mrs. Hitchcock regarding it. Mrs. Lutz, daughter of Mrs. Hitchcock, was there, and she and Mr. Lutz say that he was also there. Mr. St. John says Mr. Lutz was perhaps there part of the time, but he is not certain whether he was there during all the conversation that occurred about these payments, and the defendant, Mr. Kelley, also a witness as to this interview, says that Lutz was not there at all at the time the conversation occurred regarding these payments. Mr. St. John says that at that time he asked these papers to be given up because they had been paid to him for Mrs. Hitchcock, and he had given his receipts, and Mr. Kelley without giv-

ing details of the conversation, says that they went up there for the purpose of getting the papers. Mr. and Mrs. Lutz testified that at that time St. John said that he wanted the Kelley note for the purpose of having the endorsement of \$100 thereon which had been paid to him; and Mrs. Lutz says that she thereupon said that when the money was paid over she would endorse it, but that the paper should not be delivered or presented for the purpose of making that endorsement until the money was actually paid over to her for Mrs. Hitchcock. Mr. Lutz also testifies to that, and upon rebuttal the first time, Mr. Kelley was called as a witness, and he testifies simply that nothing was said about the endorsement of a \$100, but that he had a receipt for \$150, but the receipt or receipts, if they were given, were not produced at the trial.

Now, if the statement of Mr. and Mrs. Lutz is true as to what happened at that time, it throws something of a doubt as to the actual payment of this money at the time it is claimed to have been paid, especially the \$130. But I have mentioned all of the testimony, substantially, that bears on that point. Now, as to the authority: Suppose that we assume that these payments were in fact made, how should it be held as to there being actual authority. It appears from the testimony of all parties, that, if this general authority was given some years prior, Mr. St. John had lacked some of the usual accompaniments of such a close and confidential relation; that is, such confidential relations usually result in the agent's keeping the securities largely in his own possession, or in its being a matter of loose transaction whether he did have them or not, whether with receipts or without receipts. In this case it appears by the testimony of parties that Mrs. Hitchcock generally kept all her securities in her own possession. Now suppose some years ago, say in 1881, she made the general oral statement to St. John, "If any party wants to pay, why, I will receive the money or you may receive it; and if, sometimes, they want to pay before due, you may take the money whenever it is paid, and if extension is wanted, why, the extension will be made."

Ought that to apply to authorize the transaction that occurred in 1891 in the manner that this transaction did occur, in the absence of the delivery of the securities. It is well known that the Courts in dealing with these matters give great attention to the fact whether or not the security was in the possession of the collector. Ordinarily they hold that even if the collector has the right to collect interest, and to loan for the principal, he should be in possession of the obligation if he assumes the collection of it, and, in fact, the whole course of the decisions is of this tendency. The proof of the agency or authority to collect money in the absence of the security representing it, is held within very strict limits and bounds, and if it had been simply upon this testimony alone, we should have grave doubts whether we should hold that St. John did have the actual undoubted authority of Mrs. Hitchcock to collect this money in the manner that he did, even if it were beyond peradventure that these statements were made by Mrs. Hitchcock at the times they were made. Still, he says, that many times he collected the money before it was due upon the instrument, and afterwards paid the money to her; he says that on such occasions he went to Mrs. Hitchcock's house, asked for the securities and had the money endorsed. Now, he does not testify that, at such times, he told Mrs. Hitchcock, or that she knew that he had collected the money, representing himself as her agent in the matter, or that he simply came up as her agent, and for convenience to have the payments endorsed on the paper, but he simply presents himself at her house with the money on certain paper, saying, so much or so much money has been paid, or I have the money to pay so and so, and therefore she takes it and allows the endorsement to be made in her presence on the securities.

Now, without going into detail and following up the transaction first spoken of, that was the general way transactions were done, and while the testimony was receivable and bears on the corroboration of the testimony of St. John and shows more or less of a business relation between them; but to say that it shows

that she authorized him to receive money without her knowledge at the time, and without having the security and to actually give discharge for it, we think is doubtful. Now, there is another matter to be considered in connection with these matters that I have already stated, which still further justifies the claim made by the plaintiff.

As I have recited, the defendant Kelly does not claim that he thought St. John was acting as the agent of anybody, but that he claimed to be acting for himself and that he was the owner of the paper. If St. John had, in fact, sold the paper to some person for whom he was not acting as agent or pretending to act as agent, and Kelly paid to St. John, under the circumstances, in the absence of the paper, relying on St. John's representations that he still owned the paper, he paid it at his peril.

Mr. St. John, at that time, not claiming or assuming to act as the agent of Mrs. Hitchcock, did everything that would seem to repudiate such an idea or repudiate such a relation, if in fact anyone might have claimed that it existed, as was stated in the case of *Miller vs. Sullivan*, 39 O. S., in the opinion on page 85.

I will also read the syllabus found on page 79:

"Where an agent enters into a contract without disclosing his principal or agency, the principal, if he takes advantage of the contract, must do so subject to all the rights and equities, of which the other contracting party, who had no knowledge of the agency, might avail himself as against the agent assuming the latter to be principal."

It is also held by the Courts that while a party may pursue an undisclosed principal, when discovered—or if the agent contract in his own name for an undisclosed principal—he may pursue the agent, yet if he act with a full knowledge of the agency and the principalship, he can not ordinarily pursue to judgment and satisfaction, or even to judgment both of them. If, with the knowledge that there is a principal, when he has fully discovered that, and who the principal is, the contract being in the name of the agent alone as agent, if the party

elect to pursue the agent he cannot afterwards pursue the principal.

Now, a contract of agency has the general features of contracts in general. It is a contract establishing a certain relation between parties; it is a contract of one with the other that he allows him to act as his agent; it is the contract of the other that he will act as the other party's agent, but either party may, in general, dissolve that agency; the principal may discharge the agent, or the agent may cease to act for his principal; he may repudiate this relation and refuse to exercise the powers it confers.

Now in this case, Mr. St. John, when he came to pay to Mr. Kelley, declared himself to be the owner of the note, and this apparently repudiated the idea of his being agent of anybody. The fact that he had received the money in 1891, and that he had not treated it as the agent of Mrs. Hitchcock, and did not pay it over to her and did not report it to her, would seem to indicate that he treated it as his own money. He treated the payment of December, 1891, in the same way; and not only that, if he did receive it as the agent of Mrs. Hitchcock, he, of course, held it as her agent, and he was not at that time chargeable with the payment of the interest as her agent, at eight per cent; the paper which was thus taken up was paid; it was in fact satisfied, so that it no longer existed as a contract, and Mrs. Hitchcock, through her agent, was in possession of the money, yet St. John from time to time after that, for two years, reported that he did receive the interest at eight per cent. upon Kelley's obligation, paid it over to Mrs. Hitchcock and had it endorsed, both in 1891 and 1892. If he was an agent of Mrs. Hitchcock's or ever authorized to receive this money, it would seem that at the time that the payment was made he did not exercise his powers as agent but acted in a manner to repudiate that agency and not only at the time of the payment but afterwards.

Now, Mrs. Hitchcock is not held in any manner by any principle of estoppel bound to acknowledge these payments or to acknowledge that Mr. St. John was her agent to receive the money or discharge the obligation. We think that under all these circumstances, consider-

ing the action of St. John in receiving the money in the manner he did receive it—in receiving it for himself for his own use, claiming to be the owner of the paper, and Mr. Kelley paying it to an unauthorized person who had not the securities—we think these losses, although it is a grievous misfortune, should fall on Mr. Kelley instead of Mrs. Hitchcock, and the finding and the decree will be for the plaintiff for the foreclosure of the mortgage for the amount claimed.

T. J. Marshall for Plaintiff.

S. Scott for Defendant.

Common Pleas Courts.

(Hamilton County Common Pleas Court.)

POLLUTION OF STREAM.

Questions of Evidence in a Prosecution under Section 6921 For Pollution of a Stream.

BURCH & JOHNSON AND ANOTHER, Plaintiffs in Error, vs. THE STATE OF OHIO, Defendant in Error; memorandum of opinion.

BUCHWALTER, J.

The plaintiffs in error were found guilty in the Police Court of "unlawfully corrupting Crawfish creek, a public stream, by draining sewerage therein from premises owned and controlled by them to the prejudice of others, at the city of Cincinnati, and within the jurisdiction of the court, on the second of May, 1894."

The trial record is voluminous, and the errors claimed and considered in the argument are numerous.

The offense charged is a misdemeanor, for the violation of the state law, section 6921. Crawfish creek flows by the premises of plaintiffs in error in Columbia township, and thence through Cincinnati to the Ohio river. There is no proof showing that they corrupted the stream in the corporate limits of Cincinnati, but proof tending to show that they did so in Columbia township.

The sewerage complained of was drainage from the water closets of a new tenement house, passing through a drain pipe (supplied with a strong current of spring water) for about 300 feet into a covered vault, and thence by a covered

drain of gravel, broken stone, lime and charcoal for about 150 feet; thence in Crawfish creek on their own premises, in all about 1,000 feet; thence through various farms and country places, in all about 800 feet, passing out of Columbia township into Cincinnati, nearly one mile, until finally into a large city sewer, extending up the creek from the Ohio river.

In the trial of the cause, the testimony of witnesses was given as to their knowledge of the stream, obtained through the natural senses, and the testimony of experts making scientific tests of the water.

The prosecution gave in proof the analysis of samples of water taken on the fourteenth of May, above and below the drainage in controversy; also proof as to samples of water taken January, 1894. No sample was taken as of the date, nor within five days of the date named in the information, viz., May 2, 1894.

The defense on the trial tendered by their witness, Dr. Dickore, samples of water taken at the entrance of their drain into the ravine on May 17, 1894; also to show its chemical analysis, and also tending to show that the same conditions existed as to their sewage and the water, then, and during all the intervening time from the date named in the information, and tendered to show that said water as per sample was without smell and in far better condition, as to purity, where it left their premises on this stream than where it entered them. The prosecution objected to this proof, which objection the trial court sustained. This ruling was clearly error to the prejudice of the defendants on trial. Each party was entitled to offer the best available proof upon the issue. The water in the creek did not stand still on May 2; it ran on without waiting for time and men; therefore, the best proof from a chemical standpoint was the analysis of the water, taken at times thereafter as it ran in the stream, provided it were shown that substantially the same sewage conditions existed as of the date of the charge in the information. The analysis of the samples of water taken May 14, and offered by the prosecution, had no higher claim to competency on the charge of corrupting the stream of water May 2, than the analysis of samples of

water taken on May 17, offered by the defendants. This error was not waived, nor was it corrected by the previous admission of an analysis of samples of water taken in March previous by the same witness.

Again, the prosecution called a witness who testified to the corrupt and offensive smell of the water as it issued from defendants' drain into the creek, and the court sustained an objection to a cross examination seeking to show that the water was pure and clean at the point where it leaves their premises.

Such cross-examination was pertinent to the issue as to whether the corruption of the water was to the prejudice of others, and its rejection was substantial error.

The defendants, in the trial court, sought persistently to prove the corruption of the water by the drainage of animal manure from stables and fields and seepage from private vaults near by of corrupt material draining into the creek both above and below their premises. Such testimony by some of the witnesses was admitted, but from others refused.

The court excluded the same on the ground that no amount of corruption by others can excuse the defendants for their wrongful acts, which is a correct proposition of law, but the proof was nevertheless competent and of vital importance, as tending to show that the corrupt matter found in the water was not put there by the defendants, and the rejection of such proof was substantial error.

For the foregoing reasons the judgment herein must be reversed.

Another feature of the trial raised an interesting legal question, which I do not determine, but submit as worthy of careful study before any other trial.

The plaintiffs in error offered to prove the record of the proceedings of the Board of Health (the Township Trustees) of Columbia township, showing that they had examined, approved and given a permit to construct their system of disposing of the sewage in the manner shown at the trial.

These premises were within the jurisdiction of Columbia township, and the Trustees were the only official board

having the power to abate the nuisance or regulate it.

The Board of Health of Cincinnati have no jurisdiction in such matters outside the corporate limits of the city. The Police Court, however, had jurisdiction to try this case under section 1788 R. S., it being within four miles of the city limits, and the charge being a misdemeanor under the state law. I am of opinion the proof was competent, at least, upon mitigation of the penalty, showing an effort to comply with the direction of public authority having jurisdiction.

Whether such proceeding and permit by the Board of Health of Columbia township would, in law, in a prosecution by the public on a criminal charge, be a complete defense is a serious question, and one which I submit to counsel for further consideration.

If a complete defense in such prosecution, it would not, however be a bar to a recovery of damages at the personal suit of any neighbor injured, nor in an action in equity to enjoin them from doing that which was a private nuisance, doing special injury to the person or property of any neighbor.

For grounds before stated the judgment is reversed, at the costs of the city, and cause remanded to the Police Court for further proceeding.

Burch & Johnson for plaintiffs in error.

J. C. Hart for defendant in error.—
Court Index, Sept. 19, 1894.

Whether a draft in the ordinary form, by one bank on another, is to be regarded as a check, or as a bill of exchange, is an interesting question recently decided in the Maryland case of *Exchange Bank of Wheeling vs. Sutton Bank*, 23 L. R. A. 173, in which it was held that such draft was simply a check, and not an ordinary bill of exchange. The difference is, of course, very material in respect to the rights and liabilities growing out of the instrument. Other authorities on the question, in substance supporting the decision, are considered in a note to that case.

In last week's issue of the *LEGAL NEWS* the address of Hon. Chas. Claffin Allen of St. Louis, on "Injunction and Organized Labor," was published in full. In the general discussion which followed Hon. F. B. Sherman spoke and was listened to, says the *Chicago Legal News*, with profound consideration. His remarks were as follows:

Mr. Chairman and Gentlemen: I do not desire to argue this question at length. Certain courts have taken certain views of a statute of the United States, and have made certain decisions in suits brought by the United States, in which injunctions have been issued restraining violence against the property of the United States, interference with interstate commerce and the transmission of the mails. These cases will ultimately find their way to the Supreme Court of the United States. The appeal from the decision of Judge Jenkins made in a prior case, has been already argued before the Circuit Court of Appeals of the Seventh Circuit, and when decided an appeal will be taken to the Supreme Court for final adjudication. I do not think any one need be greatly alarmed over the exercise of judicial discretion in these cases. We have no Jeffries on the bench. None of the judges who have issued these injunctions desire to exercise power or assume jurisdiction beyond what their duty under the constitution and the laws compel them to exercise and assume. They sympathize, as does every true man, with those who do the work of the world. I think we need apprehend no dire results from this action of the courts.

It is stated, however, that the commission of crime has thereby been enjoined, and it is suggested that this is a new and dangerous precedent. A threatened act may be an invasion of private right, and as such properly enjoined, and at the same time, if actually done, may be a crime and punishable as such. Husbands have sometimes been so forgetful of their marital duty as to beat and maim their wives, and on a bill filed for divorce or for separate maintenance, courts have not hesitated to enjoin further threatened violence to the injured wife, although, if committed, the forbidden acts would have been a crime. And yet it has never been seriously suggested that our liberties were imperiled because the court enjoined violence to the person of the wife *pendente lite*. Clearly a private injury and a crime may be committed at the same time and by the same act. If the gentleman from Philadelphia should be assaulted and robbed, would it not be a private injury as well as a crime? And does the fact that the footpad may be indicted and punished as a criminal deprive him of a right of action for the private injury? And if one apprehends violence may he not in a proper case seek protection, by injunction? Judge Taft, discussing this question, says:

"It has been suggested that an injunction would not issue against the commission of a crime. The rule thus broadly stated has sometimes been announced, but it will be found on an examination of the cases that it applies.

only where the injury about to be caused is to the public alone, and where the proper remedy is by criminal proceedings. Where an unlawful invasion of private rights is threatened and an irreparable injury is liable to occur, equity will enjoin on behalf of the person whose rights are invaded, notwithstanding the fact that a criminal prosecution on behalf of the public for the same act will lie."

This is not the enunciation of a new doctrine. It is as old as equity itself.

It is said that these suits by the United States in which injunctions have been issued are without precedent. This is doubtless true. They were instituted under a special statute recently enacted, and which must be presumed to be constitutional until the Supreme Court shall otherwise determine. The Attorney-General of the United States was charged with a solemn duty in a grave crisis. After consultation with the President and the other members of the Cabinet, he directed these suits to be brought praying for injunctions which, after full consideration, were granted by the courts.

But it is said that these suits were unnecessary and improper; that the persons who were violating the law should have been arrested and tried for a crime, rather than enjoined from committing acts which were in their very essence criminal. And it is further insisted that the President should have ordered out the military and suppressed these riotous proceedings by force of arms instead of advising the Attorney-General to institute civil suits. The President and the Attorney-General were exactly in the line of their duty when in this unusual emergency they invoked the aid of the courts to prevent interference with the mails and interstate commerce before resorting to military force. To have done otherwise would have been a serious blunder, and would have subjected them to deserved criticism. Let the bar commend, and not condemn, the Executive and his advisers for exhausting all the resources of legal procedure before appealing to the bayonet and the bullet. Moreover, it was simply impossible for the United States Marshal and his deputies to arrest and bring before the United States Commissioners several thousand men armed with clubs and stones, openly defying the law and its officers and shouting, "To hell with the Government!" The consensus of opinion of candid and thoughtful men who were witnesses of these proceedings is that the course adopted was not only the wisest but the most effective one.

The safety of the people of Chicago was largely due to the Attorney-General who directed the institution of these suits, to the judges, who, in accordance with the law as they understood it, issued the injunctions, and to the President who, when the marshal and his hundreds of deputies were powerless, declared that the process and orders of the United States courts, should be respected and obeyed, if it required the whole army of the United States to accomplish that result. [Applause.] Consider for a moment our condition. Mobs had undisputed possession of various points on the railroads, at the stock yards and

elsewhere. Cars were overturned, plundered and burned. Engineers, firemen and switchmen refused to work or were driven by threats and violence from their posts of duty. The mail service was almost wholly suspended. Trains bringing supplies of food were delayed or derailed. In a few days a city of a million and a half would have been confronted by hunger, if not starvation. There were serious apprehensions that the excited and lawless mobs, composed, to a large extent, of the vicious classes who infest cities, might apply the torch to other than railroad property. At this crisis these suits were brought and these injunctions issued. They were published in all the newspapers, printed and posted up at all the railway stations and elsewhere, and the people knew that the ministers of justice had spoken.

True, the law-defying mobs did not obey until forced to do so by military power. It is said the leaders of the movement disregarded these injunctions, and proceedings are now pending to inquire whether they are in contempt for disobeying the orders of the court. They will have a patient, fair and impartial hearing. If innocent, they will be acquitted. If guilty, they will be punished. It is true that they will not have jury trials. It is also true that they have no right to a trial by jury. If the gentleman who preceded me had examined the opinion of the Supreme Court of the United States in the case of *Interstate Commerce Commission v. Brimson*, 154 U. S. p. 47, he would have been fully satisfied that no constitutional right is infringed when the court tries and punishes one who disobeys its order. In that case the court says:

"And, in matters of contempt, a jury is not required by 'due process of law.' From the very nature of their institution, and that their lawful judgments may be respected and enforced, the courts of the United States possess the power to punish for contempt. And this inherent power is recognized and enforced by a statute expressly authorizing such courts to punish contempts of their authority when manifested by disobedience of their lawful writs, process, orders, rules, decrees or commands. Surely it can not be supposed that the question of contempt of the authority of a court of the United States, committed by a disobedience of its orders, is triable, of right by a jury."

We may safely trust the courts upon which this grave responsibility is placed. Fears are expressed that evil results may follow; these fears are groundless. I predict that the outcome will be wholesome. The suits by the government, the injunctions, the trials for their violation, and the punishment of those found guilty, will teach the people of this country who think they are above the law to beware of the lightning of justice.

God grant that that may be the result. There ever was a time since our forefathers struck the first blow for liberty when such a lesson was needed, it was in this crisis through which we have just passed. [Applause.]

RIPARIAN RIGHTS.

Interesting questions concerning riparian rights and eminent domain were involved in *Cairo V. & C. R'y Co. vs. Brevoort*, decided by the United States Circuit Court, district of Indiana, in June, 1894 (Baker, District Judge). The suit was brought to restrain the construction of a levee along the bank of the Wabash river, across the complainant's right of way. The facts stated, to which defendant demurred, were substantially as follows: That the railway company constructed its railway across the river, upon a bridge with a sufficient opening on both sides of the river to permit the water accumulating in times of flood to pass under the bridge and trestle work; that part of the plan, in constructing the bridge, was to leave open trestle work on the Indiana side for the passage of flood water. The proposed levee, it was averred, would hold the flood water, when the river was high, within so narrow a channel that it would thereby become higher than it otherwise would, thereby endangering the bridge, trestle work and embankments of the railway, as well as the tracks and superstructures, and would cause the right of way and other large bodies of land on the Illinois side to be overflowed, subjecting the complainant to many suits, by the owners of such lands, for damages.

Further averments were that complainant had been in undisturbed possession and use of its right of way over twenty years, before the time when the defendant began to construct the levee; that by deed of the right of way complainant acquired an exclusive interest and estate in such strip of land, the same as though it had been condemned.

Supporting the demurrer it was contended that the riparian proprietor may lawfully protect his property from floods by erecting a dike or levee on the bank of a stream, though its necessary effect may be to turn its superabundant waters on the land of his neighbor; that the waters of a stream when swollen beyond its banks, by ordinary and habitually recurring floods, are in the nature of surface water; and that such waters are a common enemy, which such proprietor may fight off as he will. Furthermore, that the complainant by its deed, acquired only an easement of way, and that defendant retains paramount title, and might lawfully erect his levee thereon, doing no unnecessary injury to the complainant.

Decisions of the State Court were cited in support of those propositions. As to these

and other questions of importance, the Court said:

"These cases, if of the character claimed, would be authoritative expositions of the law for the control and guidance of the Courts of the State in regard to what constitutes surface water; but they would not be binding on the Federal Courts, unless the question is one of local law. The right of an adjoining landowner to make a new bank for a navigable river which forms the boundary between two States, or, by artificial structures, to turn the waters onto lands on the opposite side of the river, is not a local question, but one depending for its determination upon the general principles of the law. The Wabash river, as the Court judicially knows, and as the bill avers, is a navigable stream and public highway, upon which inter-State commerce is carried; and, this being so, it must follow that questions relating to the channel and banks of the river are in no just sense local in their nature. It is firmly settled that the decisions of the State Courts are not controlling, and ought not to be followed, upon questions of general law, where such decisions are found to be at variance with the general principles of the law (*Railroad Co. v. Baugh*, 140 U. S., 368; 13 Sup. Ct., 914, and cases there cited). The Indiana cases cited and relied on, in my judgment, have settled the law for this State that the superabundant water of a stream which, at times of ordinary floods spread out, and overflows its banks and channel, is to be deemed surface water, and, as such, that each proprietor may fight it off as he will, without liability to anyone for damages occasioned thereby. *Taylor v. Fickas* (64 Ind., 167) was an action by an upper riparian proprietor against a lower one to recover damages for obstructing and throwing back the waters of the Ohio river, which, having been swollen by rains had overflowed its banks. It was alleged that: "During times of high water and overflow, the water from the said river runs over the said tracts of land with a strong and rapid current—the general current of the same running from east to west, first over the land of the plaintiff, and then over that of the defendant the water in said current over said land varying in depth from two to ten feet—and that the water (which is in fact a portion of the said river) has run in that manner, during seasons of high water, and during times of overflow, from time immemorial." It was held that these waters were in the nature of surface water, and that the lower proprietor might lawfully fight them off as he saw fit, without regard to the damages caused thereby to the upper proprietor. The Court say: "In the complaint before us, there is no averment of any water course, except, indeed, by way of parenthesis, that the place, during floods, is a part of the Ohio river. But the facts averred clearly show that it is not upon the bed of the river, nor within its channel, nor between its banks; in short, that it is no part of a water course, but that the flow is over the entire surface of the land; is occasioned by temporary causes, and is not usually there. The rights of the appellee, therefore, are such as a proprietor may have in

surface water, which, as we have seen, is a part of his land; and the injuries or inconveniences which the appellant is alleged to have suffered are such as arise from the changes, accidents and vicissitudes of natural causes."

In the case of *Railroad Co. v. Stevens* (73 Ind., 278) the question arose upon a complaint charging that the defendant "negligent y and unskillfully built and constructed an embankment, and failed, negligently and carelessly, in the construction of the embankment, to make any culvert," and that "by reason thereof the water coming upon the land of the plaintiff, and flowing thereon from the river and from the surrounding lands, has been stopped and hindered by said embankment from following under said embankment." In deciding the case, the Court, upon the authority of *Taylor v. Fickas* (*supra*), assumed that the water which injured the plaintiff was surface water, but did not enter into a consideration of the question whether the water of a swollen stream would be regarded as surface water. The Court say: "With reasonably near approximation to accuracy, it may be laid down as a general rule that, upon the boundaries of his own land—not interfering with any natural or prescriptive water course—the owner may erect such barriers as he may deem necessary to keep off surface water or overflowing water, from or across adjacent lands; and for any consequent repulsion, turning aside, or heaping up of these waters, to the injury of other lands he will not be responsible."

In the case of *Turnpike Co. v. Green* (99 Ind., 205) it is held that a riparian proprietor may, by levees on his own land, protect it from overflow by floods—not, however, obstructing the channel of the stream; and for this purpose he may build a levee over the graveled way of a turnpike company having an easement upon his land—not materially injuring the use of the way—even though his levee causes a greater overflow of water upon the land of others, and upon the turnpike.

In the case of *Jean v. Pennsylvania Co.* [Ind. App.] (36 N. E., 159), it is held that the overflow caused by a river spreading beyond its banks in time of high water must be regarded, and may be treated, as surface water. The same principle has been recognized in the following cases: *Weis v. City of Madison*, 75 Ind., 241; *Benthall v. Seifert*, 77 Ind., 302; *Railroad Co. v. Houry*, Ind., 364; *Hill v. Railroad Co.*, 109 Ind., 511, 10 N. E., 410; *Weddell v. Hapner*, 124 Ind., 315, 24 N. E. 368; *Barnard v. Shirley* (Ind. Sup.) 34 N. E., 600.

It is insisted—and, I think, with justice—that the opinion in *Taylor v. Fickas* (*supra*), upon which all subsequent Indiana cases rest, is based on an unfounded assumption. The Court assumed what is not true, in law or physics—that the water of the Ohio river, in times of ordinary floods, is surface water. The cases cited lend no just support to the assumption on which the opinion rests. It is settled law here, as well as elsewhere—settled beyond serious debate—that a railroad company, in bridging a stream, must provide a waterway for the passage of the water which flows into and down the stream in times of or-

inary floods, but it is not bound to provide outlets for surface water. If the water of the Wabash river, in times of ordinary floods, is surface water, a railroad company would be under no obligation to provide an outlet for its superabundant water at such times; and the ultimate result would be that all the company need do is to provide outlets sufficient to pass the water which flows in the channel, and within its banks. Such, however, is not the measure of its duty. Either the cases which hold that a railroad company, in bridging a stream, must provide a sufficient water way for the passage of the superabundant water which flows into and down the stream in times of ordinary floods, are unsound, or else the doctrine of *Taylor v. Fickas* (*supra*), and of the cases which follow it, cannot be upheld.

In the decision of the case before me, it is not necessary to repudiate the doctrine of *Taylor v. Fickas* (*supra*), and of the other cases which follow it, because there is an essential difference between the facts in the present case and the facts in the cases hereinbefore cited and criticised. In those cases the embankments or obstructions complained of did not run upon and along the bank of the stream, but they were placed at right angles thereto, while here the levee runs upon the bank and parallel with the river. In this case the riparian owner proposes to change the bank by erecting an artificial upon the natural bank. There is also a plain difference between the backing up of flood waters on one side of the stream, and a change of the bank so made as necessarily to cast the water which flows in the stream at times of ordinary floods upon the proprietors of lands on the opposite side of the river. No Indiana case has been cited, and none is believed to exist, holding that a riparian proprietor has a right to erect a new bank along the margin of a stream, the necessary effect of which is to cast its superabundant waters, in times of ordinary floods, upon the lands of the opposite riparian proprietor, without responsibility for the proximate damages occasioned by such new bank. The flow of a river, when swollen beyond the low-water mark of the dry seasons by the ordinary rains which fall in wet seasons, or by the melting of snows, does not constitute surface water. The waters of a natural stream are not surface water, in any just sense, and the waters of a stream are those which are cast into it by rain-falls, and melting snows. Ordinary rainfalls are such as are not unprecedented and extraordinary; and hence floods and freshets which habitually recur, though at irregular and infrequent intervals, are not extraordinary or unprecedented. It has been well said that "freshets are regarded as ordinary which are well known to occur in the stream occasionally through a period of years, though at no regular intervals." (Gould, Waters, sec. 211c.) The waters cast into a stream by ordinary floods must have a channel in which they are accustomed to flow, and, if they have, that channel is a natural water course, with which no riparian proprietor can lawfully interfere to the injury of another. If there is a natural water way or course, and its existence is necessary to carry

off the water cast into the stream by ordinary floods, that way is the flood channel of the stream; and, if it is the flood channel of the stream, the water which flows there cannot be regarded as surface water. Surface water is that which is diffused over the ground from falling rains or melting snows, and continues to be such until it reaches some bed or channel in which water is accustomed to flow. Surface water ceases to be such when it enters a water course in which it is accustomed to flow: for, having entered the stream, it becomes a part of it, and loses its original character. "A stream," says Gould, "does not cease to be a water course and become mere surface water, because at a certain point, it spreads over a level meadow, and flows for a distance without defined banks, before flowing again in a definite channel." (Gould, Waters, sec. 264.) It must necessarily follow from this general principle that where water naturally flows, though the volume may change with the varying seasons, there is a natural water course, even though at times the place where the water flows in ordinary floods may become entirely dry. It can make no difference that the boundaries within which the water flows change with varying seasons, for the way which nature has provided for its flow is the stream, and water flowing in that water way is not surface water. As is well said in *Crawford v. Rambo* (44 Ohio St., 279, 7 N. E., 429): "It is difficult to see upon what principle the flood waters of a river can be likened to surface water. When it is said that a river is out of its banks, no more is implied than that its volume then exceeds what it ordinarily is. Whether high or low, the entire volume at any one time constitutes the water of the river at such time, and the land over which it flows must be regarded as its channel. So that, when swollen by rains and melting snows, it extends and flows over the bottoms along its course, that is, its flood channel; and when by drought it is reduced to its minimum, that is its low-water channel."

Lord Tenterden, with whom originated the expression that "surface water is a common enemy," held, in *Rex v. Trafford* (1 Barn. & Adol., 874), that the water of a stream was not surface water, and declared that the doctrine announced in *Rex v. Commissioners of Sewers* (8 Barn. & C., 355)—the case in which he used the above expression—had no application to the waters of a natural stream. In the course of his opinion, he observes: "It has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons to the injury of another. Unless, therefore, a sound distinction can be made in the ordinary course of water flowing in a bounded channel at all seasons of the year, and the extraordinary cause which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of these feeders cannot be justified. No case has been cited or has been found that will support such a distinction." In the case of *O'Connell v. Railroad Co.* (13 S. E., 489), the Supreme Court of Georgia states the question before it thus: "The precise question in this case is whether the owner of

land on the bank of a river can, without liability, erect on his own land an embankment which increases the overflow in times of flood, upon the lands of the opposite proprietor, to the injury thereof." After a full and careful consideration of the question it was held that there was no such right. In the course of the opinion the court observed: "The surplus waters do not cease to be a part of the river when they spread over the adjacent low grounds, without well defined banks or channels, so long as they form with it one body of water, eventually to be discharged through the proper channel."

In *Menzies v. Breadalbane* (3 Bligh [N. S.], 414), the Court say: "It is clear, beyond the possibility of doubt, that, by the law of England, such an operation cannot be carried on. The old course of the flood stream being along certain lands, it is not competent for the proprietors of those lands to obstruct that course by a sort of new water way, to the prejudice of the proprietor on the other side."

In *Burwell v. Hobson* (12 Gratt., 322) it is holden that the water of a stream, when swollen by ordinary floods, is not surface water. Speaking of the concession of counsel that the general rule is that the flow of a stream cannot be lawfully obstructed, and the denial of its application to the case before it, the Court said:

"But he contended that it is confined in its application to the ordinary course of the stream, and that a riparian proprietor may lawfully protect his property from floods by erecting a dike or other obstruction, though its necessary effect may be to turn the superabundant water on the land of his neighbor. Such a distinction between the ordinary and extraordinary flow of a stream is not laid down or recognized by any elementary writer, or in any adjudged case, so far as I have seen. The utmost extent to which the authorities go in that direction is that a riparian proprietor may erect any work in order to prevent his land being overflowed by any change in the natural flow of the stream, and to prevent its old course from being altered (*Ang. Water Courses*, sec. 333). But he has no right to build anything which, in times of ordinary flood, will throw the waters on the grounds of another proprietor, so as to overflow and injure them. If, in the case of such an obstruction, it appears that the injury arose from causes which might have been foreseen, such as ordinary freshets, he is liable for the damage (*Id.*, sec. 349). That the supposed distinction does not exist was expressly decided in *Rex v. Trafford* (1 Barn. & Adol., 874)."

The same principle is recognized or expressly decided in the following cases: *Jones v. Han-novan* (55 Mo., 462), *Wharton v. Stevens* (84 Iowa, 107, 50 N. W., 562), *Gerrish v. Clough* (48 N. H., 9), *Hartshorn v. Chaddock* (135 N. Y., 116, 31 N. E., 997), *Byrne v. Railway Co.* (38 Minn., 212, 36 N. W., 339), *Wallace v. Drew* (59 Barb., 413), *Ordway v. Village of Canisteo* (66 Hun, 569, 21 N. Y. Supp., 835), *Carriger v. Railroad Co.* (7 Lea., 388), *West v. Taylor* (16 Or., 165, 13 Pac., 665).

With reasonably near approximation to accuracy, it may be laid down as a general rule that all the waters of a river, which form one

body, when flowing within the boundaries, within which they have been immemorially accustomed to flow, in times of ordinary floods, constitute waters of the river, and are not surface waters.

The complainant owns a right of way over and across the lands of the defendant, 200 feet in width. Its title thereto was acquired by a deed of conveyance from the same party from whom the defendant subsequently acquired his title. The deed conveyed to the complainant all the right, title and estate which could have been acquired under condemnation proceedings under the statute of the State in that case made and provided. The complainant acquired an easement in the land, whose nature and extent are such as is necessary for the purpose of maintaining and operating its railway. The estate of the complainant is the dominant, and that of the defendant the servient (*Davidson v. Nicholson*, 59 Ind., 411; *Robinson v. Thraikill*, 110 Ind., 117, 10 N. E., 647). The grant of an easement conveys all such incidental rights as are necessary to the enjoyment of the thing granted. The use to which an easement is devoted, or for which it is created, determines its character; and to the extent that the use is necessary to carry out the purpose of the grant, the rights of the owner of the easement are paramount. An easement granted to a railway is essentially different from any other. The nature of railway service requires exclusive occupancy. A railroad company is held to the highest degree of care, and the exercise of this care necessarily requires that it should have complete dominion over its right of way. It is bound to prevent obstructions from being placed on its tracks, and is required to keep them fenced in, and free from rubbish or other combustible materials. The duties of a railway company are due to the public as well as to individuals, and these duties it must perform at its peril. The rules which apply to the use of streets or highways fail, when applied to railroads, because the necessities of their use are different. The railroad must have the exclusive possession and control of the land within the lines of its location, and the right to remove anything placed or growing thereon, which it may deem necessary to remove to insure the safe management of its road (*Hayden v. Skillings* [Me.], 6 Atl., 830; *Brainard v. Clapp*, 10 Cush., 10; *Hazen v. Railroad Co.*, 2 Gray, 577; *Locks & Canals v. Nashua & L. R. Co.*, 104 Mass., 11; *Jackson v. Railroad Co.*, 25 Vt., 150; *Railroad Co. v. Holton*, 32 Vt., 43; *Atlantic & P. Tel. Co. v. Chicago, R. I., & P. R. Co.*, 6 Biss., 158, Fed. Cas. No. 632). The construction of the levee as proposed would be a plain invasion of the complainant's exclusive rights. It follows from the foregoing considerations that the demurrer must be overruled, and it is so ordered.

ABSTRACTS OF RECENT DECISIONS.

The right of a bank to set off the deposit of one partner against a firm overdraft is denied in *Adams vs. First Nat. Bank of Winston* (N. C.) 23 L. R. A. 111; and a note to the case shows that other decisions are to the same effect.

The right to levy on crops as personal property is upheld in *Polley vs. Johnson* (Kan.) 23 L. R. A. 258, where the crops were annuals and products of industry. A note to the case reviews the large number of decisions as to levy on crops as personal property.

Power of a court to grant an injunction against a nuisance maintained by a municipal corporation is sustained in *Atlanta vs. Warnock* (Ga.) 23 L. R. A. 301, in respect to a nuisance of poisonous gases from a sewer. The general question is extensively presented in a note to the case.

The fact that a railroad company is compelled by statute to blow a train whistle, as a signal, is held in *Bittle vs. Camden & A. R. Co.*, L. R. A. 283, to be no defense to an action for damages caused by the frightening of a horse by such whistle, if it was blown negligently, wantonly, or maliciously.

State land in use by a court is held, in the Illinois case of *Mt. Vernon vs. People*, 23 L. R. A. 807, to be exempt from assessments for street improvements, and the subject of municipal assessments of state property is considered in a note to the case, with a review of the authorities on the question.

The deduction of debts from taxable credits is held in *Florer vs. Sheridan Ins. Co.* (Ind.) 23 L. R. A. 278, not to be an exemption or a violation of a constitutional guarantee of uniformity and equality. The constitutionality of such provision for deduction of debts from taxable property is considered in a note to the case.

The liability of a banker who gratuitously loans money for a customer on forged securities is a somewhat novel question presented in *Ishman vs. Post* (N. Y.) 23 L. R. A. 90, in which the alleged negligence of the banker is carefully considered, and his liability denied if the forgery was such as to deceive a fairly prudent banker.

The lack of jurisdiction to decree a divorce between persons who are both nonresidents of the state, is held in *Ellis's Appeal* (Minn.) 23 L. R. A. 287, not to be a ground for avoiding the decree in a collateral proceeding by one of the parties, where they voluntarily appeared and submitted to the jurisdiction. The effect of appearance by a nonresident to give jurisdiction of a divorce case is the subject of annotation to the case.

Whether or not the death of a party will relieve from obligation to perform his contract is sometimes a fine question. Death is held in *Drummond vs. Crane*, 23 L. R. A. 707, not to prevent the continuance of a contract for a water supply. In the annotation to the case, a large number of cases as to the effect of death on a contract are presented and classified.

Political cases in the courts have been exceedingly numerous in recent years, and among them is the late Kansas case of *Lewis vs. Lewelling*, reported in volume 23 of the *Lawyers' Reports, Annotated*, page 510, which upholds the governor of that state in disbanding a company of the state militia. This power of the governor of a state to disband its militia, as established by decisions in other states, is shown in a note to that case.

The privilege of a member of the legislature is the subject of the recent Minnesota case of *Rhodes vs. Walsh*, 23 L. A. 632. In that case the court decides that a legislator's privilege or exemption from arrest during the session does not extend to the service upon him of a summons in a civil action. The annotation to the case reviews the decisions as to privileges from suit given members of state legislatures and of congress.

The attempt in New Jersey, to establish the doctrine that the state senate is a continuous body, such that the hold-over members have the power to control its organization without regard to the wishes of the newly elected members, which was very ingeniously and tenaciously made in the case of *Atty. Gen., ex rel. Werts vs. Roberts*, was not successful. In the *Lawyers' reports, Annotated*, vol. 23, page 354, the case is very fully reported, with the elaborate arguments of the counsel in the case.

A city ordinance prohibiting the throwing of fish or offal into a river was recently held void in the North Carolina case of *State vs. Eason*, 23 L. R. A. 520, on the ground that the boundary of the state was the low-water line of the river. With this case is a note on the subject of the boundary of a municipality on a navigable stream, which shows that it is generally the same as that of private premises on such streams, unless the legislature has fixed a different boundary. It is of considerable importance, as well as interest, in many cases, to know whether a city has any jurisdiction over a river which constitutes a city boundary.

It does not seem possible that not many years ago courts held it unlawful to sue a foreign corporation outside the state in which it was created. The subject is suggested by the recent South Dakota case of *Foster vs. The Charles Bechter Lumber Co.*, 23 L. R. A. 490, in which a local agent of a foreign lumber company was held to be a "managing agent" within the meaning of a statute as to service of process on such companies. A note to the case on the question of who may be served with process in a suit against a foreign corporation, shows how swiftly the law on this subject has advanced.

The indorsement of a check "for deposit," although it is a transaction that has been exceedingly common, is one on which there has not been much law created by decisions of courts. Like many other matters in banking, custom itself has been the law, but has not been brought to adjudication in many instances. In the recent Maryland case of *Ditch vs. Western National Bank of Baltimore*, 23 L. R. A. 164, such indorsements were held to transfer the title of a check to a bank which had taken it and paid for it in good faith, although a collecting bank from which the holding bank received it had become insolvent before paying over the proceeds. The effect of such indorsement is also the subject of annotation to that case.

"Give an explanation of the nullification troubles in Georgia," was asked of a class in American history. "The nullification troubles in Georgia," was one reply, "were in regard to the constitution, whether it should be null and void. Some wanted it null and others wanted it void."

A witness, in describing an event, said, "the person I saw at the head of the stairs was a man with one eye named Wilkins."

"What was the name of the other eye?" spitefully asked the opposing counsel.

The witness was disgusted with the levity of the audience.

The seat of a jurymen absent from the court was taken possession of by a dog. The judge, addressing one of the counsel said, "You see, Mr. Bosworth, the jurymen's seats are all occupied; are you ready to proceed?" The lawyer raised his glasses to his eyes, and, after a brief survey of the jury box, made the witty reply: "Your honor, that fellow might do for a judge, but I should hate to trust him for a jurymen." The judge joined heartily in the laugh that followed.

Judge Joseph E. Gary, of Chicago, was a visitor in the Circuit Court in Toledo one day this week. The venerable Judge is an interesting man anyway, but since his connection with the anarchist trials, the details of which were given new life through Altgeld's opposition to Judge Gary's renomination and re-election, he is a man whose personality is of interest to everybody and whose thoughts and opinions are eagerly sought on every hand. Of the Judge it is easy to write, for there is much to say, not only pertaining to the trials which made him famous, but of his long service on the bench. He is now seventy-three years of age. He was first elected a judge of the Superior Court of Cook county, Illinois, in 1863. Although still a judge of that Court, he is now one of the three Circuit and Superior Court judges chosen by the Supreme Court to sit as an Appellate Court, a tribunal much the same as the Circuit Court in Ohio. Physically Judge Gary is not a giant, in fact he is below the medium height, but well proportioned. He has excellent health and is as active as the majority of much younger men. The many years he has been on the bench have not stolen companionable attributes, for Judge Gary is accessible and a pleasant man to meet. His hair and beard, side-whiskers, for his upper lip and chin are smooth shaven, are snow white. He has a resolute face, but it is a pleasant reflection of good thoughts, lofty ambitions and the sterling qualities which for many years placed his name, for judicial honors, on every political ticket in Cook county.

Speaking to the LEGAL NEWS Judge Gary referred, in response to an inquiry, to his judicial service. He was first elected in 1863 as a candidate on the Republican ticket. In the years following he was the choice of both, or rather all parties, until by the influence of Gov. Altgeld his renomination was opposed before his last election. It seems, however, that the anarchistic governor's influence elected the man whom he aimed to defeat. Altgeld, it appears, was plaintiff some years ago in a suit against the city of Chicago. It was an action for damages for a change of grade and Altgeld, in the lower Court, recovered a judgment for about \$28,000. The case was appealed, and the Appellate Court reversed the decision. Judge Gary did not deliver the opinion, but concurred in the decision. After the case had been reversed, Altgeld, evidently in a rage, wrote a disreputable letter to the Court. This was years ago, but when Altgeld's opposition to Judge Gary's election became known the letter turned up

and was published in the *Chicago Tribune*. It explained to the people the opposition to the respected Judge, which had been veiled under other colors and the result was his election by a handsome majority.

It is now about six years since Judge Gary has served on the bench of Courts of original jurisdiction. In the Appellate Court, while each of three judges have a right to sit as Circuit or Superior Court judges, their time is entirely occupied by the business of the Appellate Court. Cases there are all submitted on printed records and briefs, and not upon the original papers, as is the practice in our Circuit Court. Oral arguments are permitted, of course, but are not common.

The prosecuting attorney of Hancock county, does not appear to be satisfied with the law as laid down in *Toledo vs. Yeager*, (see LEGAL NEWS, Vol. 1, page 113), in which decision pipe lines and property of the natural gas department of Toledo was held to be public property within the meaning of section 2 of article 12 of the Constitution, and therefore exempt from taxation. A similar suit has been instituted in Hancock county, and the papers were served on Toledo officials last week.

When Judge Underwood, of Georgia, had charged the jury, it was exceedingly dangerous for the defendant's counsel to ask for an additional charge. William Glenn had been defending a big, strapping town boy, who was charged with an assault and battery upon a smaller boy. The big boy had been imposing upon the little fellows, and one of them hit him with a switch and ran. The big boy pursued him, threw a stone at him, cut a bad gash in his head and laid him up for a week or two. The grand jury found a true bill, and, after the closing speech of the solicitor, the judge charged the law very fairly, and then asked if there was any other charge that counsel desired. Glenn rose, and, with some tone of apprehension, said "I believe your honor omitted to charge that self-defense may justify an assault." "Yes," said the judge, as he straightened up, "yes gentlemen, there is such a law, and if you believe from the evidence that this great, big, double-jointed, big-fisted young gentleman was actuated by fear and self-defense when he ran after that poor, little, puny, tallow-faced boy, and, because he couldn't overtake him, picked up a rock big enough to knock down a steer, and threw it at him and knocked him senseless, then you can find for the defendant. Any other charges, Brother Glenn?" "I believe not," said Glenn.

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The case of *STATE OF OHIO ex rel. J. K. RICHARDS, Atty. Gen. v. C. F. ACKERMAN et al.*, transacting business as the Guaranty & Accident Lloyds, to appear in 51 O. S. R. is reported in full in 24 L. R. A. (Part 3, Aug. 15), and accompanied by an exhaustive annotation of the authorities bearing upon the points decided in the case. The defendants, without being legally incorporated, associated themselves together for the purpose of transacting the business of insurance, by articles of agreement, under which they were to issue policies in the artificial name of the "Guarantee and Accident Lloyds, New York." The court held that in so conducting their business, the defendants unlawfully exercise a franchise and may be ousted from transacting the business of insurance within the state.

Circuit Judges, at the opening of the fall term, particularly in the larger cities of Ohio, are or will be confronted with another new law having reference to the disposition of business in the Circuit Courts. We refer to section 448 of the act, page 304, O. L., which provides for advancing cases "when the relief sought is damages for personal injury, or for death caused by negligence, and the person injured makes affidavit that he is, or in case of death, the widow, or any next of kin of the deceased, makes an affidavit that they are dependent for their livelihood upon their daily labor." This law casts quite a shadow to attorneys not interested in personal injury cases in places where there is an epidemic of that class of litigation. An arbitrary rule of advancing such suits whenever the letter of the law should be complied with would mean, in some cities, an exclusion of every other class of business from consideration by the Appellate Court, at least during the short terms. The law is not mandatory, however, and we presume the courts will take a reasonable view of its intended application and inquire into the merits of each case, going, if necessary, a little beyond the formal compliance with the law. One Circuit, the Sixth, has already adopted that rule.

LAW BOOKS BOUND.

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The times of holding Circuit Courts in Ohio was arranged for the several counties, at the annual convention of Circuit Judges last week, as follows:

FIRST CIRCUIT.

Hamilton, January 2, November 6.
Clermont, April 2, September 30.
Butler, April 8, October 7.
Warren, April 22, October 21.
Clinton, April 29, October 28.

SECOND CIRCUIT.

Franklin, January 7, September 16.
Madison, April 2, October 7.
Greene, April 8, October 10.
Miami, April 15, October 21.
Shelby, April 25, October 31.
Champaign, April 29, November 6.
Darke, May 6, November 11.
Preble, May 15, November 20.
Fayette, May 20, November 25.
Clark, June 3, December 9.
Montgomery, June 17, December 16.

THIRD CIRCUIT.

Allen, April 2, November 19.
Auglaize, April 16, November 29.
Crawford, February 26, October 15.
Defiance, January 29, October 1.
Hancock, May 21, December 10.
Harden, March 12, October 29.
Henry, February 5, October 3.
Logan, February 12, October 10.
Marion, January 22, September 24.
Mercer, April 23, November 26.
Paulding, March 5, October 22.
Putnam, March 19, November 12.
Seneca, May 7, December 3.
Union, February 19, October 8.
Van Wert, April 30, October 24.
Wyandot, January 15, September 18.

FOURTH CIRCUIT.

Athens, January 23, September 24.
Adams, April 3, November 7.
Brown, April 9, November 12.
Gallia, February 26, October 15.
Hocking, February 5, October 1.
Highland, April 17, November 19.
Jackson, June 4, December 17.
Lawrence, March 5, October 22.
Meigs, February 19, October 10.
Pike, May 27, December 12.
Pickaway, April 24, November 26.
Ross, May 9, December 3.
Scioto, March 13, October 29.
Vinton, February 12, October 7.
Washington, January 15, September 8.

FIFTH CIRCUIT.

Ashland, May 7, November 12.
Coshocton, May 3, November 5.
Delaware, June 11, December 17.
Fairfield, January 8, September 10.
Holmes, May 14, November 19.
Knox, March 19, October 7.
Licking, March 26, October 14.
Muskingum, April 16, October 21.
Morgan, April 30, October 28.
Morrow, June 4, December 16.
Perry, May 28, December 3.
Richland, January 15, September 17.
Stark, February 26, September 31.
Tuscarawas, May 21, November 26.
Wayne, February 12, September 24.

SIXTH CIRCUIT.

Lucas, January 7, September 16.
Wood, April 29, October 21.
Huron, May 13, November 6.
Erie, May 27, November 18.
Williams, June 10, November 25.
Fulton, June 13, November 29.
Sandusky, June 17, December 2.
Ottawa, July 1, December 16.

SEVENTH CIRCUIT.

Ashtabula, March 5, September 3.
Belmont, June 18, December 17.
Carroll, January 22, September 19.
Columbiana, January 29, September 24.
Geauga, February 26, October 1.
Guernsey, June 13, December 12.
Harrison, June 4, December 3.
Jefferson, May 21, November 19.
Lake, February 12, October 3.
Mahoning, March 26, October 15.
Monroe, May 28, November 26.
Noble, June 11, December 10.
Portage, April 30, October 29.
Trumbull, May 7, November 7.

EIGHTH CIRCUIT.

Cuyahoga, January 14, October 21.
Summit, April 15, September 18.
Lorain, April 29, October 7.
Medina, May 6, October 14.

OHIO DECISIONS.

The pages of this publication will be so arranged, hereafter that the important decisions of our courts will be printed in a separate section, in order that they may be bound in a book by themselves. The title of this book will be "Ohio Decisions" and it will contain the leading cases decided in courts lower than the Supreme, so far as they are reported. We shall have more to say concerning it in the future.

(State of Ohio, Cuyahoga County, in the Court of Common Pleas).

DEDICATION OF STREETS.

THE LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY, a corporation, Plaintiff,
vs. THE CITY OF CLEVELAND, ET AL., Defendants. Decision.

1. Where an allotment is made in partition proceedings, by the express terms of which a right of way is reserved *to the owners of the lands allotted* on and along the streets marked and laid down on a map attached to, and made a part of, said proceedings, such right of way is limited to such owners, and does not constitute a dedication of said streets to the public. Such dedication cannot be extended beyond the terms limited by the dedicators, although such streets may have been open to use by the public, and ordinances may have been passed by the Common Council in regard to them; and they may have been described and set forth in conveyances on record for many years.

2. Non user of streets within a municipal corporation, by the public, must continue for twenty-one years, in order to work an abandonment.

NOBLE, J.

In the case of the Lake Shore & Michigan Southern Railway Company against the City of Cleveland, the plaintiff sets forth in its petition that it is now, and has been for many years, the owner of a continuous line of railroad from Buffalo, in the State of New York, through Cleveland, to the City of Chicago; that its business is that of a common carrier; that a portion of its tracks in this city, and many of its side tracks, switches and turn-outs—all of which are in constant use, and necessary in the operation of its road—are located upon, and extended across, what is known as the "Island property," bounded on the north by Lake Erie, on the east by the Government Pier and the Cuyahoga River, on the south by the old river bed, and on the west by the old river bed and a line from the northwesterly end thereof extended to the waters of the lake; that it has been for more than twenty-one years the owner of all property occupied by any of its said tracks, side tracks, switches and turn-outs, upon the premises so described as the Island property; and that it and those from whom it acquired said premises have been in constant, uninterrupted, and undisturbed possession, use and enjoyment of the same for more than twenty-one years last past, and that its possession and occupation has been open, notorious, and adverse to the defendants, with claim of title thereto; that on September 12th, 1892, the Common Council, unlawfully

and without authority, passed a resolution, directing the Director of Public Works to at once take possession of some portions of said premises, but which portions, it is unable to designate; and to remove therefrom its tracks and other structures; and that the Director of Public Works, acting on this instruction, is about to unlawfully enter upon the premises so owned and occupied by said railroad company, for the purpose of tearing up and removing therefrom the main tracks, side tracks, switches, turn-outs, and other improvements so placed there and now used by it.

And the plaintiff says further, that it has no adequate remedy at law; and that unless restrained by the Court, defendants will unlawfully, and without authority of law, at once cause said main tracks, side tracks, switches and turn-outs, to be torn up and removed, thereby making it impossible for it to operate its road and conduct its business, to its great and irreparable injury; that an injunction is asked for by reason of these facts, restraining defendants from in any manner interfering with plaintiff in its use and occupation and possession of the premises described, or in the operation of its road upon said premises; and restraining them from removing any of its tracks, side tracks, switches and turn-outs, or other structures upon said property, and for all such other and further relief as is equitable.

The right to an injunction is based entirely upon ownership by the Lake Shore & Michigan Southern Railway Company, of the property occupied by its tracks, side tracks, switches and turn-outs upon the Island property, and its use, occupation and enjoyment, either by it or its grantors, for more than twenty-one years last past; such use, occupation and enjoyment having been, as is claimed, notorious, and adverse to the city, with claim of title thereto.

The answer and cross-petition of the city denies this, and sets up a state of fact by virtue of which it claims affirmative relief against the plaintiff. They say that on the 12th day of September, 1892, the Common Council adopted the following resolution:

"Resolved, That the Director of Public Works be, and he is hereby instructed

and directed, to remove all obstructions from those parts of the following named avenues and streets lying north of the northerly side of Bennett street, to wit: Waverly Avenue, and Andrews, Giddings, Union, Hanover, Hickory, Mulberry, Center, Elm, Sycamore, and West River streets, and to prevent any and all encroachments thereon;" that it is the duty of the Director of Public Works to carry out these instructions in a lawful manner.

And they say, further, that the Island property—so called—was allotted by its former proprietors, and various streets and highways dedicated to, and accepted by, the public; that in 1796 Seth Pease, under the direction of Augustus Porter, Agent for the Connecticut Land Company, made a survey of the original town of Cleveland, and a plat thereof, called "Plan of the City of Cleveland," which was accepted by the company, and recognized and accepted by the public as a plat and allotment of the town of Cleveland, although not recorded in Ohio.

Subsequently, in 1800, a law was passed by the territorial legislature of Ohio, requiring such plats to be recorded, and in 1801 the Connecticut Land Company caused a new survey to be made by Amos Spafford, in accordance with the survey of Pease, and a plat thereof was duly filed in the recorder's office of Trumbull county, wherein the village of Cleveland was then situated; and subsequently, when Cuyahoga county was organized, it was duly filed here on November 22, 1814.

By reason of the premises, defendants claim that the lands embraced in the plat, including Bath street, were properly dedicated and accepted by the proper authorities.

Subsequently, in 1826, the United States Government changed the channel of Cuyahoga River near its mouth by a cut through to the lake, leaving a portion of Bath street, as originally laid out, on the west side of the river, and included in the Island property. That portion of Bath street so cut off and transferred to the west side of the river, is particularly bounded and described in the cross-petition.

The defendants claim that the part so cut off, still remained a public highway and street, and under the supervision and control of the municipal corporation within whose limits it was situated; that it remains so still, and that the City of Cleveland now has the care, supervision, and control over it.

Defendants further say that in 1831-2, Alonzo Carter dedicated to the public for a street, a strip of land sixty-six feet wide, commencing at a point on the west side of the river opposite the foot of Superior street, and running along near the west bank of the river to the lake; that the public accepted it properly, and that it was called Lake street; that in 1832 the County Commissioners laid out a county road sixty-six feet wide beginning at the intersection of Center and Detroit streets, and thence along the westerly side of the river to the lake, including Lake street within its limits, and it was then accepted by the proper authorities and called River street, and subsequently West River street.

Further, the defendants say that in 1833 the so-called Buffalo Company Allotment was laid out and dedicated, and accepted by the proper authorities, and properly recorded, whereby fourteen feet were added to the westerly side of West River street for a considerable distance, making it eighty feet wide. By this same allotment Sycamore street, Old River street, and Willow street, were laid out, the first two being sixty-six feet wide, and the latter fifty feet wide. In the same years the owners of lots lying west of West River street—as it is now called—and north and east of the old river bed—so called—and south of Lake Erie, being the greater part of the Island property, aperted their lots, and properly recorded a plat thereof, whereby and whereon they laid out and dedicated certain lands and streets to public uses, for highway and street purposes, the streets—except Willow, which was fifty feet—being sixty-six feet wide, and called Sycamore, Elm, Center, Mulberry, Hickory, West, Union, Giddings, Andrews, Old River, Willow, Macey, Thompson, Tyler, Baldwin, Pratt, Carter and Bennett streets. And they say that these streets were duly recognized and accepted by the public and other proper authorities.

Furthermore, they say that in 1848 Charles Whittlesey and William B. Lloyd made an allotment of certain lands contiguous and adjacent to Bath street on the west side of the river, and recorded a plat thereof, and thereby laid out and dedicated certain lands and streets known as Albert and William—now called Toledo—streets, each sixty-six feet wide, and Lloyd street, sixty feet wide, and certain alleys not named, sixteen and a half feet wide; and that these were recognized and accepted by the public and the proper authorities; that over all the streets and alleys mentioned, the proper authorities have always exercised control, and the City of Cleveland has had for many years, and now has, the supervision and control over the same for street purposes, and that it is required by law to keep them open, in repair, and free from obstructions.

In May, 1851, the Common Council of the City of Ohio passed a resolution giving to the Junction Railroad Company—to whose rights the plaintiff, it is said, has succeeded—the right to lay its tracks, under the direction of the Committee on Streets for that year, in certain streets, and the company did lay one main track in and along Bennett street and Bath street, and across Andrews, Giddings, Union, West, Hickory, Mulberry, Center, Elm, Sycamore, West River and Lloyd streets. But the City says that the permission thus granted was, and is still, subject to revocation, and to the use and improvement of the streets by the City of Ohio, and its successor, the City of Cleveland; and that the company's use of these streets was, and is subservient to the use and improvement thereof by the City, and the public generally, for street purposes; that shortly after laying this track, the company abandoned the use thereof, and for thirteen years did not occupy the same; and it is claimed the company thereby lost its right to use these streets, and that the permission granted has fully terminated and ceased; that in July, 1854, the City, by its Mayor, A. C. Brownell, undertook to give to the Cleveland & Toledo Railroad Company, successor to the Junction Railroad Company, and to the Cleveland & Mahoning Railroad Company, certain privileges in Bath street west of the river, but that it had no au-

thority so to do, and that it was therefore void, and that in fact the grantee never undertook any action under it.

It is further claimed that in 1866 the City of Cleveland gave the Cleveland & Toledo Railroad Company permission to occupy, for railroad purposes, any streets north of the old river bed, east of and including Elm street and west of the Cuyahoga River, provided that the company relinquished to the City any rights it then had to occupy other streets west of the river, except its right on its main line, and provided the right to occupy said streets should not infringe on the rights of adjacent lot owners, and the company should not prevent the City from at any time directing and requiring the said streets to be graded or otherwise improved, according to law and the ordinances of the City. This permission by the City is, however, claimed to be subject to revocation by the City, whenever it should deem it for the advantage of the City and the public, to use said streets exclusively for street purposes, and that it is subject to the use and improvement of the streets by the City and the public generally for street purposes. The City claims further, that under said permission the company has a temporary right to the use of said streets west of Elm street for one main track on its main line, and on said streets lying east of the west line of Elm street, north of the old river bed, and west of the river, to use the same for such number of main and side tracks and switches, as will not interfere with the proper use and improvement of all of said streets by the City, or public generally, for the usual and ordinary purposes of streets and highways.

It is said that under color of the authority so granted, the company has laid an additional main track along Bennett street west of Elm street, and across Center, Mulberry, Hickory, West, Union, Giddings and Andrews streets, and also three side tracks and several switches along Bennett street west of Elm, and across Center, Mulberry and Hickory streets, south of said main tracks, and has located, erected, and maintained buildings, shops, structures, shanties, tanks, derricks, piles of lumber and iron, and various other obstructions, but all contrary to, and without the permission

given by the City, and against the laws of the State, and inconsistent with the use and improvement of streets as public highways. And the City says further that recently the company has laid side tracks and switches in and across Mulberry, Hickory, West, Union, Giddings, and Andrews streets, north of the north line of Bennett street, without any authority, and that the same are unlawful obstructions.

It is further alleged that the railroad company now disclaims the superior authority of the City over these streets, and repudiates the permission given, and pretends to hold them adversely, and contrary to the rights of the City, and asserts that no part of the land within the limits of these streets, should be devoted to the purposes for which they were given and dedicated, to-wit, street purposes. And the City says that the Common Council now deems it necessary, and for the advantage of the City and the public generally, to remove all tracks and other obstructions from those of its streets north of the northerly line of Bennett street, and to prevent any and all encroachments thereon; and that in view of the company's disclaimer, of the City's interest in these streets, it is the duty of the City to establish its paramount rights; and that if it is prevented from removing the tracks and obstructions—except such as the Council has permitted to be laid, subject, however, to the use and improvement of the streets as public highways—and clearing up and removing the same, so as to make them fit for travel as streets, it would be doing the City and the public irreparable injury.

In conclusion, the City prays for an order and decree, fixing and determining the rights of the City in all of the said streets, highways, and alleys, and that plaintiff's use thereof for railroad purposes, is derived from the resolution adopted by the Council of the City, and subject to revocation at any time the Council may deem it for the interest of the City and the public generally, to use said streets exclusively for street purposes, and requiring the company to remove from said streets and alleys all its tracks, switches, buildings, shops, shanties, structures, tanks, derricks, piles of

lumber and iron, and other obstructions, except one main track on its main line west of Elm street, and such number of main and side tracks and switches east of the westerly line of Elm street, as will be consistent with the proper and ordinary use and improvement of said streets for street purposes, and that the company be perpetually enjoined from using or occupying them, or any part of them, contrary to the permission given by the City, and for such further relief as equity and good conscience may require.

To this cross-petition the company files an answer in which it admits that the Common Council adopted on September 12th, 1892, the resolution set out in the cross-petition. It admits also that the City of Ohio, on March 13th, 1851, passed a resolution directing the Junction Railroad Company—to whose rights the plaintiff has succeeded, to lay certain tracks, and that on July 5th, 1854, the City of Cleveland granted to the Cleveland & Toledo Railroad Company, and to the Cleveland & Mahoning Railroad Company, the use of certain lands on Bath street. The balance of the cross-petition it denies, except such parts as are admissions of plaintiff's allegations.

The first question to be determined is, Can affirmative relief be granted under the cross-petition, or must its allegations be regarded solely as a defense.

The objections urged by the plaintiff are, that the petition is not one to quiet title, and that the cross-petition does not contain facts sufficient to give the Court jurisdiction to render a decree to quiet title, or to render any affirmative relief. The petition is, itself, not one to quiet title, as the Court held early in the hearing of the case. It simply seeks to restrain interference with its tracks, side tracks, switches and turn-outs, on the ground that it has title to the ground on which they rest. There is no prayer for quieting title, but a general prayer for such other and further relief as the Court can give.

Section 5071 R. S. as amended, Vol. 9, Session Laws, 226, provides what the answer may contain by way of cross-claim. Its language is, that the defendant "may claim therein relief touching the matters in question in the petition."

against the plaintiff." It looks to settling controversies on the same subject matter in the same action, but goes no further. An action to quiet title is purely statutory. Section 5779 R. S. covers it. It reads as follows: "An action may be brought by a person in possession by himself or tenant, of real property, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse estate or interest; or, such action may be brought by a person out of possession, having or claiming to have an estate or interest in remainder or reversion in real property, against any person who claims to have an estate or interest therein adverse to him, for the purpose of determining the interest of the parties therein." There is no averment in the cross-petition that defendant is in possession of the premises in controversy by itself or tenants, or that it claims to have any estate or interest in remainder or reversion therein.

Counsel for the City claim that the allegations of petition are such as to make it one to quiet title, under the general prayer for equitable relief, although that particular relief is not asked for; and this being so, a cross-petition to quiet title is proper, and may be successfully maintained.

Two cases in our Supreme Court are cited as authorities for this position. One is reported in the 35 O. S., p. 597, Bailey vs. Hughes; the other in the same volume, page 567. Bartholomew vs. Lutheran Congregation. In the first case the Court held, upon a fair construction of the petition, that it did sufficiently allege possession in the plaintiff, and defendant's adverse claim; in no manner, however, abrogating the statutory rule that *both must be alleged*. In the second case the object of the suit was to enjoin the defendants from molesting plaintiffs in the control and occupation of a church building, and to *quiet plaintiff's title*. The answer prayed that the plaintiffs be enjoined from using or occupying the church building, or interfering with defendant's use thereof. The Court, while it found against the plaintiffs, *quieted title for defendants*, considering the answer as a cross-petition; and in delivering its opinion, used the

following language: "As it is unnecessary, in adjudicating as to the rights of the defendants below, to find any fact which was not necessarily and fully found, in determining as to the rights of the plaintiffs below, *on the petition to quiet the title*, and restrain the defendants, we are unable to perceive any reason why an order should not be made in this case, on the cross-petition, restoring defendants and their successors to the possession and control of the property, for the use and benefit of the congregation, and enjoin plaintiffs and their successors from interfering with such possession and control." The finding was based, it will be observed, wholly, or in part, *upon the averments in the petition, asking to have the title quieted*. The case at bar is plainly distinguishable from this, in that the petition herein, contains no prayer for quieting of title, and the allegations in it are not sufficient to bring it within the requirements of an action to quiet title, as provided in Section 5779, R. S. The plaintiff company *simply avers title as a ground for an injunction*. But aside from this, there is still the further objection, that the cross-petition itself contains no averment that the City is in possession of the premises in controversy, by itself or tenant, or that it claims to have any estate or interest or remainder or reversion therein. And if it be true that the plaintiff is in possession, and the City has the right of possession of the premises, the plaintiff would be entitled to a jury trial, unless waived, before it could be ousted. But this, while an objection to the Court's granting affirmative relief, may still be taken advantage of as a defense. The Court is, therefore, of the opinion that no affirmative relief can be granted under the cross-petition and answer, and that the allegations therein contained, and the proof thereunder, must be considered as matters of defense, simply, to the petition.

Let us first see what the issues thus raised, are:

First, the plaintiff asks for an injunction on the ground that its tracks and side tracks, switches and turn-outs, on what is known as the Island property, are upon property owned by it, and that it and its grantors have been in constant, uninterrupted, and undisturbed posses-

sion, use, and enjoyment of the same for more than twenty-one years last past, and that its possession and occupation thereof has been open, notorious, and adverse to the City, with claim of title thereto.

Second, that the Common Council of the City, on September 12th, 1892, passed a resolution, directing the Director of Public Works to at once take possession of some portion of said premises—but which, it is unable to designate—and to remove the company's tracks and other structures; and that the Director of Public Works is about to unlawfully enter said premises for the purpose of tearing up and removing therefrom the main tracks, side tracks, switches and turn-outs, and other improvements. The resolution complained of is as follows, as appears by the answer:

"Resolved, That the Director of Public Works be, and he is hereby instructed and directed to remove all obstructions from those parts of the following named avenues and streets lying north of the northerly line of Bennett street, to wit: Waverly Ave., and Andrews, Giddings, Union, Hanover, Hickory, Mulberry, Center, Elm, Sycamore, and West River streets, and to prevent any and all encroachments thereon."

The City, however, in its answer goes further, and says that it is its duty to keep *all* streets on the Island property clear of obstruction, and that it proposes to do so; so that the investigation includes *all* the streets, or what are claimed to be such, in that part of the City known as the Island property, and particularly described in the petition as bounded north by Lake Erie, east by the Government Pier and the Cuyahoga River, south by the old river bed, and west by the old river bed and a line from the northwesterly end thereof, extending to the waters of Lake Erie.

To sustain its claim of title the railroad company introduces the right granted to the Junction Railroad Company, a corporation formed in 1846. This was in the form of a resolution by the Common Council of the City of Ohio, passed May 13th, 1851, and is as follows:

"That permission be, and is hereby granted to the Junction Railroad Company, to use any streets or alleys in the

City lying north and east of Washington street."

The work is directed to be done under the direction of the Committee on Streets. Under this permit the Junction Railroad Company built an embankment, substantially as it is now, running east from the head of the old river bed to the river, on what is called Bennett street, and laid thereon one main track, and one or two side tracks; that the embankment and tracks so laid crossed the line of all of the streets mentioned in the resolution of the Common Council, and of all the streets on the Island property running to the lake.

The plaintiff further shows that this company, or its successors, the Toledo, Norwalk & Cleveland Railroad Company, operated the road for a time, and then ceased, taking its last car over the track in 1858, as one witness testifies. From then up to 1866 it was not operated, although the embankment remained substantially intact, and the road-bed and rail as well. Since that time, that company and its successor, the Lake Shore Railroad Company, (with which it was consolidated in 1869), and the Lake Shore & Michigan Southern Railroad Company, (formed in 1869 by the consolidation of the Lake Shore Railroad Company, and the Michigan Southern & Northern Indiana Railroad Company), have operated it continuously. The track built originally by the Junction Railroad Company in 1854, is substantially the present south main track. The testimony shows that there were then two long side tracks; that in 1868 there was one main track and several side tracks; that in 1869 or 1870 the main side track north of the present south main track was carried west, making the two main tracks, and that north of the north main track was a side track to an engine house; that in 1873 a parallel side track was built; that in 1875 the breakwater side track was completed; that the embankment has not been raised since 1868, to speak of; that side track No. 1 north of the main track ran to the engine house in 1868; that side track No. 2 north of the main track was put there in 1869; that the top of the embankment is from 25 to 26 feet wide at the west end, varying somewhat, up to about 3,300 feet from the draw-

bridge, and from there easterly it is about 80 feet wide; that at the west end it is 38 feet high, gradually decreasing as it approaches the river, to a fill of about 6 feet at the river; that at its base the embankment is about 40 feet wide; that the embankment was constructed, and these tracks laid over and across said streets, with the knowledge of the City authorities, and without objection by anybody; that the company made its improvements at an expense of about \$250,000. Under these circumstances the claim is made, that the company's tracks and improvements cannot now be disturbed by the City.

As a defense to this, the City introduces a large mass of testimony tending to show either a statutory or common law dedication of all the streets in controversy, and that they are, or should be, still under its control; that the fact of their existence has been recognized and accepted by the authorities of both, the City of Ohio and the City of Cleveland, by the public generally, and the plaintiff as well, from the time they were originally laid out till the present time; that their character as public streets has never ceased to exist; and that they are still subject to the control of the proper City authorities; that in 1866 the plaintiff even went so far in its recognition of these streets, as to enter into a written contract with the defendants in regard to the use of them, which is still subsisting and in full force; that by its terms the railroad company is entitled, east of and including Elm street, to nothing but a single track, and that west of it, all the streets are subject to be opened and improved by the City, and that that contract is revocable at the pleasure of the City.

In order to reach conclusions at all satisfactory it is necessary to examine the testimony somewhat in detail.

First. *As to Bennett street*, on a line of a part of which, it is admitted that the railroad tracks and embankments rest. The first that the evidence shows in regard to it is, that there used to be a wagon road along a ridge just south of the waters of Lake Erie, commencing nearly at the river and running westerly, and that near, or a little west of the river, was a mound or hill, pretty nearly

in the line of the road. This was used as a traveled road from about 1835 to 1841, or later, perhaps. Before the railroad was built, the testimony shows that teams crossed this road to the lake at about where Toledo street is now located; and that since the railroad was built, there has been no road crossing the tracks to the lake, except at or near that point. On Ahaz Merchant's map of 1850 it does not appear as a named street, although there appears a division corresponding to it. The other streets in controversy in the Island allotment—so called—are named on it. In the grant to the Junction Railroad Company by the City of Ohio it is not mentioned. The language used is: "Any of the streets or alleys in the city lying north and east of Washington street;" and this would include it. On the Cleveland & Toledo Railroad map of 1867 it appears, and in nearly, if not quite all, of the railroad maps in evidence, including the map of 1884 between the different railroad companies and persons claiming to own lake frontage on the Island, and it was attached to the agreement made between them, at that time. It does not appear by name on the Sargent map of 1865, although there is a line of demarkation corresponding to it. The other streets in the Island allotment are named, however. The map in the record of partition of the Island property in this Court, and which is claimed to be the instrument which either directly dedicated this property, or was a step in this direction, has it. This was made in 1835. Whether this street, and the other streets included therein, have received such a dedication as the law recognizes, by virtue of these partition proceedings, is an important question. The history of the partition allotment, or Island allotment—so called—as shown in testimony, is as follows: In 1835 N. C. Baldwin, B. F. Tyler, Philander Bennett, Sheldon Thompson, Hiram Pratt, J. B. Macy, Guy H. Goodrich and W. H. Richards, who owned nine-twelfths of the property in question, commenced suit for partition in this court, making as defendants, the owners of the other three-twelfths, to-wit: W. R., Eliza H., Edward O., John E., Lucia A., Henry R., and Harriet M. Andrews, minor children

of Major A. Andrews, and John T. Hudson. In this proceeding, in obedience to the order of the Court, John M. Woolsey, Ahaz Merchant and H. B. Wellman, Commissioners of the Court, aparted to the heirs of Major Andrews, blocks Nos. 9 to 12, as shown by the map attached to the report of the commissioners, and bounded them easterly by the old river bed, westerly by Lake Erie, north by the north line of Mulberry street continued. It is to be observed, that this description makes no mention of, and crosses, Macey, Thompson and Bennett streets. They also aparted to said heirs blocks 41, 42, 48 and 49, bounding them southerly by the old river bed at its northern extremity, westerly and northwesterly by Lake Erie, easterly by a line parallel with and 2,346 feet westerly from the west side of Willow street on the east side of the old river bed, and northerly by a line parallel with and 666 feet southerly from the south side of West street continued. Andrews and Bennett streets are crossed in this description, but without mention.

To John T. Hudson they gave blocks 47 and 40, bounding them westerly by the last mentioned piece, north by the north line of the same continued easterly and parallel with West street, south by the old river bed, and east by a line parallel with and 1980 feet westerly from the west side of Willow street. Also blocks 23, 24 and 25, bounded north by the south line of West street continued, east by the old river bed, south by a line parallel with and 290 feet southerly from the north line, and west by a line parallel with and 1182 feet distant from the west side of River street. This description crosses Macey and Thompson streets without mention. They aparted the balance of the land on the Island to the other parties to the suit, subject, however, as the report reads, "*to the right of way forever to all owners of said lands above described on and along the streets marked and laid down on the map of the said Island which was heretofore made by Ahaz Merchant by order of the owners of the said Island (thereto attached and made a part of the report) and on which the blocks heretofore described by numbers are marked with corresponding numbers.*" The map attached

shows the Island property divided into blocks and streets; the streets named on it north of the old river bed are: Bennett, Andrews, Giddings, Union, West, Hickory, Mulberry, Center, Elm, Sycamore, River, Carter, Pratt, Baldwin, Tyler, Thompson and Macey. This map followed a map made in 1833 by Ahaz Merchant, at the request of Giddings, Tyler and Baldwin, as he certifies, and acknowledged by them, and by Bennett, Andrews and Thompson, as a plat of a village laid out in Brooklyn, Cuyahoga county, at the mouth of the Cuyahoga river on the west side thereof, and it was filed with the county records. On this map the streets run across Bennett north to the lake, and we find between Bennett street and the lake, lots Nos. 2, 5, 8, 12, 17, 28, 35 and 42. The acknowledgment of the signers to the map did not include, however, all the owners of the property so that it did not make a good statutory dedication of the plat. The proceeding in partition certainly did not, and is not claimed by the City that it did make a statutory dedication of these streets. It is claimed, however, that they constituted one step toward a common law dedication. If there was a common law dedication then, it must have been by the subsequent acts of the owners, coupled with sufficient acts of acceptance by the proper authorities. What was done?

In 1838 the owners of the property other than the Andrews heirs and Hudson, decided to hold their shares in severalty, and employed Ahaz Merchant to make a survey. Silas Merchant, son, testifies to this, and that he assisted in making it; that he knew of no streets until they were laid out by his father in 1834-35-36-37; that in driving stakes for his father at that time, he had to wade some, and get onto planks and boats, and that west of the Lake Erie Iron Company, it was all swamp. After the survey was completed, quitclaim deeds were made to each other by the above owners, all bearing date July 1, 1837, dividing up the property between them. The property is described block so and so (giving the proper block number on the island) of Ahaz Merchant's surveys and allotments, as recorded in the record of deeds of said

county, being a part of the village plat of Brooklyn, now Ohio City. Subsequently to this the City of Ohio passed a considerable number of ordinances in regard to the streets on the Island, and in regard to changes in the old river bed. After annexation the city of Cleveland assessed the streets for taxation, and actually bid them in at tax sale, at an expense of \$24,000. Some dredging was done before annexation, by the City of Ohio, and the refuse was piled up at the foot of the streets—some witnesses say, and others say it was distributed indiscriminately, along the bank and river front, without regard to streets or lots. Bridges also were built at Center, Old River and Willow streets. From 1837 to the commencement of this suit, the testimony shows a large number of conveyances by blocks, all of public record. The Common Council of Cleveland also fixed, March 13, 1866, the dock lines of the streets of the old river bed, using the lines of some of these streets as monuments. West River street, Old River street, Macey, Elm, Mulberry, Hanover, Andrews, Giddings, Center and Carter streets, to which the dock lines are deferred, are by ordinance located and defined by stone monuments, marked D. L., and mentioned and placed. The contract between the plaintiff and defendant of 1866, which will be presently referred to, was also made, as well as one or two other contracts bearing upon these streets, all tending, as far as they went, to show an acceptance, or of an attempt to accept these streets, by the city, for the use of the public.

There was also a large amount of testimony introduced tending to show to what extent the streets had been used by the public generally, and to what extent the City had actually improved, or done work upon them. Captain Robinson, whose acquaintance with the Island dates from a very early time, says he is not acquainted with any streets but Bath, West River and Willow streets. Mr. Dare, a civil engineer, who has known the Island since 1837-38, says he does not think the streets north of the river bed could be found, except with reference to the streets on the south side of the old river bed. He knows, and has known for forty years, no roads across

the railroad tracks, except at about Toledo street, which is not in the Island allotment; that B. F. Tyler once made some improvement on Elm street for 200 or 300 feet; that he never knew Mulberry street as platted; that there was too much swamp; that Center street was opened as a road, but never improved within continuous lines, and was used as a *private street*; that he attempted to set stakes in Andrews street, but could not find it or Macey street by extending lines; that he had stakes on the lines of West River, Macey, Elm and Sycamore streets; that he could not tell accurately the side lines of West River street; that there were three railroad tracks in and about Macey street; that the traveled road is, and was south of Macey street; that there was many years ago a wagon road partly on Sycamore street, which was the road to the head of the old river bed; that Elm street was used from 1836 to 1852—part of it—and Sycamore, near the hill, from 1836 to 1854; that Bennett street was used as a traveled road from 1835 to 1841, or later; that there has been no driving across the embankment at Elm street for twenty-five years; that there was no road along the line of Hanover street.

J. G. White testifies that there was no road west of the inclosure around the Rolling Mill from 1857 to 1961.

D. M. Carrell testifies that there is no evidence of any streets between Elm and Oakland.

J. M. Watts says that since 1867 there has been no road to the lake between Toledo street and Oakland.

Ed Lewis says he has been in business on the Island since 1854, and that there were no streets ever laid out or improved by the City; that all the streets, he made himself—some eight or ten of them—and let others use them; that there was no regular street between the Rolling Mill and Willow street; that they went across lots.

George Presley has known about the Island property, and has been in business there since 1843. He says that there have been no streets there, and there are none now; and that during the whole time, he never knew of any work done on the Island by public authority.

Mr. Farrell Gallagher says that Thompson, Tyler, Baldwin, Pratt and Carter streets were none of them opened, nor were Sycamore or Elm ever opened to the lake.

All of the witnesses for the City testify they found no streets nor drives across the embankment on which the railroad tracks rest, except at what is known as Toledo street, but which is not in the partition allotment.

On the other hand, Mr. Pat Smith says that seven or eight streets on the Island were plowed up by Jeff Thomas, who was street commissioner in 1854 or 1855, but that some parts of them were so swampy that he could not plow them up; and that after the dredging, the City put in a row of spiles in front of all streets.

Mr. Farrell Gallagher, whose memory goes back to 1853, also testifies to the existence and use of some streets between Willow street bridge and the lake. He says that one could drive across Willow street east, and come out where the Valley tracks are now, on West River street, and that you could drive along near the lake shore tracks, in what is called Bennett street north of the swamp, and that there was always a little driveway on Bennett street. Also as to Macey street he says that a man named Cross once built an ice house on it, opposite Hanover street, and he drove to it up the streets where the tracks were; that after the dredging was done by the City of Ohio, one could drive all along up to the head of the river bed; that the road was parallel with the embankment, starting at the head of the Island and fetching up opposite Mulberry street, and thence turning to Macey street; and that it is used to-day and has been all the time; that Mulberry street was on the edge of the swamp and extended south of Bennett street all the way up; that he knows Willow street and Toledo street, and Macey and West River and Bath and Bennett streets; that there were fences at one time on Macey street; that the only road now used north and south would be Mulberry street, west of the Rolling Mill, which starts from Macey and runs out; that there was a road on Macey and Mulberry streets, but they put tracks on it; that there was no road on Macey after one got to Mulberry; that the roads va-

ried some, but there has been driving for the last twenty years; that there is a road on Mulberry north to the lake shore tracks, which connects with another road running west.

Charles Giessen, civil engineer and surveyor, located some of the streets by monuments, although somewhat uncertain as to them, within a short time previous to the hearing of this case.

Several witnesses testified to the large number of people crossing Willow street bridge daily at the present time, and going through streets or roads to their work in the Rolling Mill, or for the railroads on the Island. Several also know that the embankment of the railroad has been largely used for foot travel, its entire length. The Court was very fully satisfied, that it would be extremely difficult for any one at the present time, to accurately locate these streets, even with the assistance of public and private records. Lots and streets are, and have been used indiscriminately, apparently, for highways, or for the erection of buildings, or for storage purposes. Obstructions are the rule, rather than the exception, over a large extent of the Island. To drive from one end of it to the other on the lines of streets, as laid out on maps, would be impossible.

A map has been introduced showing the course necessary to take, in order to drive from the head of the riverbed, eastwardly to the river. It begins on the right, and at the foot of, the railroad embankment at its westerly end, and south of the south line of Bennett street—as near as the Court can judge—and then runs easterly till about midway between Tyler and Baldwin streets—so called: then it runs southeasterly across block 21, across Hickory street, across block 14, across Mulberry street, and at the southwest corner of block 10 it crosses Macey street in a northeasterly direction, and runs across Center street onto and across block 6, and then across Elm street and across blocks 3 and 2; then it runs across Sycamore and part of block A, and then at right angles it crosses West River street and runs along William street, across Lloyd street, and across the railroad tracks to the lake, just at the river. The only work that has been done on these streets by way of im-

provement has been mentioned, with the exception of laying plank between the rails where the road or street crosses the railroad; and this planking even, it is shown by the evidence, was done by the railroad company, or others in business on the Island, for their own convenience. There seems to have been no effort at least since 1866 on the part of the City to improve these streets, or to make them useful as public highways for travel, other than by rail or water. Some of these streets are practically obliterated as streets, and water slips have taken their place.

While there is some contradiction, the fair preponderance of the testimony certainly shows that while there has been some legislative action by Common Councils of both the City of Ohio and the City of Cleveland, as to these streets, there have been no physical acts by either of the cities, looking to their improvement, or even their practical location, for at least forty years.

Something has also been done by the plaintiff railroad company itself, it is claimed, by way of recognizing the existence of these streets. The contract of 1866 between the plaintiff and defendant is probably as important a recognition as has been made. Let us consider that, and its legal effect. In the 4th paragraph of the contract, the company is given the right to occupy for railroad purposes, any streets north of the old river bed, east of and including Elm street, and west of the Cuyahoga River. And the proviso connected with this is, that the railroad company shall relinquish to the City any right it may have to occupy other streets in the City west of the river, except its right on its main line, provided the right given shall not infringe on the right of adjacent lot owners in said streets, or prevent the City from directing or requiring the same to be graded or improved according to law or the ordinances of the City. This contract was made, it will be remembered, about twenty-eight years ago. Then, in 1888, the plaintiff company was a party to several deeds where the several companies and individuals, having or claiming to have interests on the Island, attempted to quit-claim to each other certain riparian rights. In

these transfers the Sargent map was adopted and used as reference, and these transfers were put on record. This map shows each street as laid out in the original Ahaz Merchant plat, and measurements and distances are called for, from the center of these streets; but it is to be remarked that in deeding to each other, the grantors *did not extend the streets on street lines*. These certainly stand as strong items of testimony, tending to show recognition by the plaintiff of the existence of these streets. Then too, all, or nearly all maps in evidence prepared by the plaintiff, and introduced, in some instances by the railroad company, and in some by the City, show these several streets.

Taking into consideration the acts of the owners of the property, the acts of the public, including the plaintiff, and of public authorities, what is their legal effect as to making a good common law dedication of the streets in question? If their effect is to make a good common law dedication thereof, then they are still streets, and under the control of the city, unless they have been vacated by law, or abandoned by non-user.

What is a good common law dedication?

Our Supreme Court has said just what constitutes it, in the case of the lessees of the incorporated village of Fulton vs. John Mehrenfeld, 8 O. S., 440: "To constitute a valid dedication of a street or highway at common law, there must be not only a *dedication* to public uses by the owner, but also an *acceptance* of such dedication by the public; and these may be shown by the acts and declarations of the parties, and the surrounding circumstances." This is affirmed in the 19 O. S., page 245, Whisby vs. Bonte and others. In the report of the commissioners in the partition proceeding, we find the dedication of the streets and alleys to be subject to the right of way "*forever to the owners of said lands* above described, on and along the streets marked and laid down on the map of the said island made by Ahaz Merchant, attached to and made part of the report." The language used, in the opinion of the Court, can hardly be said to indicate an intent to dedicate the streets and alleys to public uses, since it especially *limits the use of them to the*

owners of said lands. It is true that those who took in severalty, as well as those who took in common under this proceeding, ratified and adopted the plat attached, and known as the Merchant map. But could they, by so doing, extend the terms of the dedication of the streets and alleys as originally made, and by that mere fact make public the right of way which, by special and specific terms had been made private? Could the public extend its terms any? If extended at all, they must be extended by *all of the owners of the property.* This has not been done. Could the public, or city authorities, by accepting and ratifying a dedication, to private use, enlarge it into a dedication to public use, without the assent of all the property owners? Could the public or city authorities accept what was never tendered? It certainly seems to the Court extremely doubtful.

A very strong case in support of plaintiff's contention that the partition allotment was not, and could not be a dedication to the public, is that of the Mayor of Baltimore vs. White & Shipley, 62 Md., page 362. The conveyance in the partition deed in that case, for which dedication was claimed, read thus: "And the said Miles White and John H. Barnes, for themselves and all others claiming under them, covenant with each other that they and all others claiming under them, shall have free ingress and egress through any and all streets and alleys laid down in Poppleton's plat of Baltimore, which run through the land hereby conveyed." The Supreme Court of Maryland held that to be a clearly personal covenant, "which was to run with the land, and was only intended to benefit and bind parties and privies, and that specific language was used to indicate this purpose, and to exclude all idea of public dedication." And it further held that the reference to streets by name, and to Poppleton's plat, "was for convenience sake, in having easily ascertained boundaries for their respective holdings, and of the direction in which they might use passages, as their necessities demanded. If this is a private dedication, whatever the right of the purchasers of lands fronting on these streets may be, they cannot be made the

foundation of a public right, in a suit of this character. Lot owners are not complaining, and are not parties."

There is another case, the Illinois Insurance Company vs. Littlefield, 57 Ill., page 368, and it is along the same line. In that case the conveyance, after describing the lots intended to be transferred, contains the following language: "The remaining ten feet of the east side of said lot being reserved for an alley between the parties to this deed." The Court held that the purpose of the reservation was not for the use of the public, but for the parties to the deed, and that it made no difference that the alley had been opened for years to the public use, or that it was described in several conveyances as an alley, and that the owner paid no taxes; that the purpose was plainly avowed in express terms, not for the use of the public, but for the parties to the deed.

And the Supreme Court of Ohio, in the case of Longworth vs. Cincinnati, 48 O.S. 646, uses this language: "Actual dedication, we take it, means unconditional dedication. This implies an intention to yield up to the public every private right in, and every private right growing out of the land, leaving no right in the former owner except such as he enjoys in common with the public." In that case the municipal corporation had taken a man's land and made a street of it without his consent. The owner, upon learning of it, acquiesced in it as an accomplished fact, and ratified it by tendering a deed, and by offering to allow judgment, that, upon the value of the premises being fixed, and payment of the same, he should be ordered to convey. But the Court held that such acquiescence and ratification would not be treated as a dedication of the land to public use. This case only carried a little further the general principle laid down in the Mehrenfeld case already referred to. Under that principle the Court is unable to discern in this partition proceeding, an intent on the part of the owners of the land to make a dedication of these streets and alleys to the use of the public; nor can the Court find from the evidence that *all* the subsequent owners showed a clear and manifest interest to so dedicate them.

After the partition allotment, we find those who took in common what was left, after the heirs of Andrews and Hudson had their shares set off, divide the property among themselves, always referring to the plat made by Ahaz Merchant; and from that time to this, so far as the records have been introduced, transfers, nearly all refer to this plat for description, and they refer to it in different ways.

There is a large number of conveyances on the Island from 1837 down, in evidence, and in a great number of them the transfers are by blocks. In some cases, however, streets are conveyed, no attention being paid to them. It does not seem to the court, that the terms of the original dedication can be extended by a part of the owners of the property, as already suggested. The terms of the dedication of the streets, limit their use to the owners of the property. The public cannot make them public streets, against the express dedication to private use, by using them; neither can the city authorities accomplish that result by legislating in regard to them, as held by the Supreme Court of Illinois in the case cited, and by our own Supreme Court in the 19th O. S. While it is true that slight acts on the part of the City will amount to an acceptance of a dedication, and while it is true that there may have been enough done by the public authorities to make an acceptance of these streets, so far as they are concerned, such acts cannot be properly considered as extending the original terms of the dedication, and as accepting what was not tendered. A taking what was not offered, would be an appropriation, and the law provides how that may be done.

The opinion of the Court, then, is that as to the streets and alleys in what is known as the Island, or partition allotment, there has been no sufficient statutory or common law dedication.

The remaining question as to this allotment then presents itself: Is the plaintiff company, by the acts of recognition referred to, and notably by the contract of 1866 with the City of Cleveland, estopped from now claiming that these are not streets?

The doctrine laid down by our Supreme Court in the case of Coakley vs.

Perry & Payne, 3 O. S., page 344, is, that estoppel applies only where the grantee in the conveyance, receives and holds possession *under the conveyance*, and relies upon it as his source of title; and not where the grantee holds the title under a prior, independent conveyance. In this case the plaintiff did not hold or take possession under the contract of 1866 with the City of Cleveland. It had possession for many years prior thereto under an arrangement with the City of Ohio, made by its predecessor, the Junction Railroad Company; and the Court fails to see why, under this decision, it is by the contract of 1866 estopped from saying that the streets in controversy are not in fact streets.

There is still another difficulty as to the streets involved in the resolution of the Common Council complained of, *north of the north line of Bennett street*. There has not been a particle of testimony tending to show any act by the City, as to the shore end of any of the streets on the Island allotment, and none to indicate any use by the public at any time since the so-called allotment, of any portion of these streets, north of the north line of Bennett street. There has been an utter and complete abandonment ever since they were laid out. There has not been a single physical act done by the City on any of these streets north of Bennett street. The shore line on a great part of the distance east of Pratt, and west of Center street, has been so eaten into by the lake, that whatever street lines may have existed north of Bennett street, have disappeared; and were it not for the embankment, and between 40,000 and 50,000 carloads of stone placed on and north of the embankment by the Lake Shore R. R. company, the old shore line of 1835 could not be found to-day. Certainly, so far as these portions of the street are concerned, there can be no question as to their complete abandonment for more than forty years by the City. If the Island, or partition allotment—more properly speaking—is not a good statutory dedication of the streets therein named, and the subsequent acts by the owners of the property, and the proper authorities, and the public generally, have not made it a valid common law dedication of the streets

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therein named, it must follow that what are claimed to be streets, are not in fact such, and that the basis upon which the City claims its rights in these streets, and the right to remove the obstructions complained of, must fall.

We now come to the consideration of what is called West River street. It was originally laid out as a public road in 1831 or 1832, by Alonzo Carter, and known as Lake street. Then in 1832 the County Commissioners enlarged it into a county road sixty-six feet wide, which they laid out, beginning at the intersection of Center and Detroit streets, and thence running along the westerly side of Cuyahoga River until it reached the lake. This was done in accordance with the provisions of law in such case made and provided, and it was then called River street, and subsequently West River street.

In 1833, N. C. Baldwin and others laid out what is known as the Buffalo Company Allotment, recognizing this road as a street, widening a portion of it to eighty feet, and completing a statutory dedication of it. The west or north line of this allotment, however, did not extend to the lake shore. It stopped at the west line of block A of said allotment. Subsequently, in 1837 or 1838, the ship channel was opened, and a part of the street was thus placed on the north side of the old river bed, and with it two other streets, Old River and Willow streets, and two blocks. In 1835, the partition suit before mentioned was instituted, and partition made as well of this allotment as of the Island allotment, with this difference, that in the Buffalo Company allotment there was no limitation of the right of way to the owners. In 1836, the 3d of March, the village of Ohio was incorporated, embracing this street within its territorial boundaries. There being a statutory dedication of this street, the question is whether it still remains a street, or whether it has been abandoned, and by non user has ceased to be a street north of the old river bed. The testimony of Mr. Dare shows that it was used as a street in 1838. It appears on the later map used by Delamater and the ship channel commissioners in 1854, and also on the map attached to the contract for dredging. Farrell Gallagher says he

knew of it, and that the hill or knoll commenced just at West River street, and that the first bridge he knew of was at West River street for foot passengers, and remained there till the river was widened in 1854 or 1855, and that there was no bridge there after that, till the Valley Railway bridge in the '80s, and that there was a roadway the width of West River street to the lake within the last thirty years; that there was one till the Valley Railway tracks were laid in 1880; that he saw wagons there; that they crossed Willow street and turned to the right down to the dock, and struck West River street between 200 and 300 feet from the ship channel; that he had not seen them cross the tracks, however, in twenty-five years but had seen them drive up West River street to Willow street in that time, and had seen them driving on the east side of the railroad track in West river street last year; that there is a saloon now on West River street and that it is on the street with the tracks, and moved there last year.

James Sturtevant and Otto Dercun surveyed the land on West River street and presented a plat of it in evidence taking as a starting point the Cathoe Corner, as it is called, that is, the corner of the Meyer & Osborn block of to-day running it from there to the south shore of the old river bed, and from there to the lake shore, using the old road records. The result of these measurements differed some from the old road records north of the ship channel. Sturtevant found no improved street, nor any road running in the direction of any street north of the old river bed.

Pat Smith testified to a bridge at West River street at an early date, and that there was a road to the lake by the head of the pond; that in 1847 or 1848 a roadway was made across the end of the pond and Tisdale and Johnson filled up some holes around there for a yard, and that he filled up some too.

George Prasley says there were no streets, either traveled or in a direct line, and there were none ever worked by the public authorities north of the old river bed. He was on the Island and just across, on the south side of the ship channel, at the end of Willow street, from 1845 up to six or seven years ago, and

he says that during the whole time he was there, he never knew of any work done on West River street on the Island by public authorities; that Johnson and Tisdale and he, kept the roads open.

Ed Lewis has been on the Island and in business since 1852 in the Lake Erie Iron Works, located just where they are now. He says no streets have ever been laid or improved by the city, and that he made them all himself, and let others use them—eight or ten of them—and he made them just wherever they could get through.

Mr. Dare knows of no road since 1837 or 1838 that would be on the line of West River street north to the lake. The ship channel was completed in 1863, he says, and he had stakes on the line of West River street as originally laid out; that he had driven on it a little way, and when he got off, it was because of obstruction or because he wanted to; that there was a pond near West River street connected with the bayou; that he could not tell accurately the side lines of the street, but knew about where they were; that there was considerable driving across it; that between the pond and the ship channel there was only a few hundred feet; that the present wagon road runs across West River street, and goes through Toledo street on the line of West River street. He never knew of a bridge for teams.

John G. White knew the Island from 1857 to 1862. He says that in crossing the Willow street bridge the road followed westerly along the bank of the river around to the Otis Iron Works; that here was a high picket fence there going at right angles toward the lake; that the road ended between two buildings, not reaching the embankment at all. And with that exception he swears there was no defined track anywhere and no traveled road in any direction, no road that stayed in one direction, although following some general direction.

J. M. Watts says the roadway from Willow street bridge has been the same since 1868.

C. L. Russell says West River street went to the lake and the east end of the Buffalo Company purchase; that he was one of the ship channel commissioners, and knew of no work ever done

on the north side of the ship channel on West river street; that he did some work on West River street between the south-erly side of Main street and the bend at the bridge. In 1881 the City of Cleveland made an agreement with the Valley Railway company whereby it gave permission to that road to use and occupy West River street 442 feet easterly of the old river bed, and thence westerly through said street 1,640 feet to the tracks of the Lake Shore & Michigan Southern road, crossing the old river bed by the draw-bridge, and permission was also given to conduct a switch track through West River street running from the above track.

Some other witnesses were examined in regard to it, and some ordinances passed by the City, were introduced. But the clear preponderance of the evidence certainly shows that the City of Ohio, while it had control, and the City of Cleveland since, have done nothing whatever by way of use or improvement of this street, *north of the old river bed*. It was improved up to that point before 1840, but nothing beyond it. I say, nothing—the testimony, it is true, shows there was some little dredging in front of it, in common with the rest of the river frontage on the old river bed, and the earth thrown back; but from there to the lake, nothing has been done from that time to this, and it has not been used by the public generally as a street during all that time, within its allotted lines. It would be difficult to find a clearer case of abandonment. In so holding, the Court is not unmindful of the fact that in 1881 the City gave permission to the Valley Railway Company to lay its tracks thereon. But the fact that it assumed that power after nearly forty years of abandonment, and made the contract mentioned, cannot bind this plaintiff, so far as its rights exist by virtue of the abandonment.

As to Sycamore, Willow, and Old River streets, laid out in the Buffalo Company Allotment, the clear preponderance of the testimony shows that none of them have ever been used or improved by the City authorities, and that the public generally has not used them as streets since 1854 at least. The Willow street bridge—so called—is not at Willow street at its northwesterly end, and the road

leading north from it, does not follow the line of Willow street as laid out. Sycamore street, although some parts of it around the bluff were used originally by the public from 1836 to 1854, since that time, it has been used, the evidence shows, for storage purposes by the different people in business there, rather than for the purposes of a street. The traveled road running west, runs across its line diagonally.

As to what is abandonment, the court is, of course, guided by the opinion of the Supreme Court in *Nail & Iron Company vs. The Furnace Company*, 46 O. S., page 544. In that case the Court says: "It appears to be well settled by the authorities that in order to work abandonment by simple non user of an easement, all acts of enjoyment must have totally ceased for the same length of time necessary to create the original presumption. And we hold that where non user by the public of a street within a city is relied upon as proving an abandonment, such non user must be shown to have continued for a period of twenty-one years." Applying this doctrine to the non use of these streets as shown by the testimony, how is it possible for the Court to reach any other conclusion than that there has been a legal abandonment, so far as the right of the City is concerned to set up their existence, as a defense to the action of the plaintiff.

We now come to the consideration of Bath street, as it is called, and the Whittlesey & Lloyd allotment, north of the old river bed. Bath street is all north of the north line of lot 191, and includes all the land from that to the lake, four or five acres, perhaps.

Bath street first appears on what is known as the Pease map. This map was never recorded as required by law; but it was made for the benefit of the Connecticut Land Company, and that company used it from the time it was made, 1796, till 1800. Then it employed Mr. Amos Spafford to resurvey its lands, and he did so on the same lines that Pease had surveyed. The map made by him was, in accordance with law, placed on record at Warren, Trumbull County, in 1802. On this map Bath street occurs as lying on the east side of Cuyahoga River next to Lake Erie, and terminating on the west,

at the junction of the river and lake, in an irregular shaped piece of land.

In 1814 the legislature incorporated the village of Cleveland, and in the act of incorporation, provides that so much of the City plat of Cleveland in the township of Cleveland, Cuyahoga county, as lies northwardly of Huron street—so called—and westwardly of Erie street—so called—in said City plat, as originally laid out by the Connecticut Land Company, according to the minutes of the survey and map thereof now on record in the office of the recorder of said County of Cuyahoga, shall be a village corporation. This was a clear recognition and adoption of the Spafford map by the legislature, and is without doubt a good and valid statutory dedication. It has been repeatedly recognized by our Courts, notably in the case of *Holmes and others vs. the C., C., C. & I. R. R. Co. et al.*, U. S. Circuit Court, 8 Am. Law Register, page 716; the Public Square case decided by Judge Prentiss in this Court; and in *Gleason vs. the Park Commissioners*, 49 O. S., page 94.

In 1826-27 the U. S. Government changed the channel of the river bed, cutting through Bath street at its westerly end, and leaving a triangular shaped piece of it, on the west side of the river. It was thereby thrown into Brooklyn Township, and so remained till 1836, when Ohio City was incorporated by the legislature. The City of Cleveland was incorporated at the same session. The two acts of incorporation make the river the boundary between the two cities, in the opinion of the Court, so that the part of Bath street cut off, was then embraced within the corporate limits of Ohio City, and that city exercised control over it and passed ordinances in regard to it. June 5 and 6, 1854, the cities of Ohio and Cleveland were annexed. On the 10th day of June, 1854, less than a week after the annexation, action was taken by the plaintiff and defendant as to Bath street. Communication was made to the Council from the Cleveland & Mahoning and the Cleveland & Toledo Railroads, in which they say they occupy a portion of Bath street, and ask that they may be permitted to occupy it for the time being. June 14, 1854, the Common Council acted favorably, and

MURDER—CORPUS DELICTI.

The opinion of the Supreme Court of Washington in *State v. Smith* (July, 1894, 37 Pac., 491) reviews the evidence on appeal from a conviction for murder, demonstrating that such evidence, though most of it circumstantial, was sufficient to warrant the verdict, and that the *corpus delicti* was sufficiently shown.

On the latter point the Court said: It is contended by the learned counsel for the defendant that the evidence in this case is entirely insufficient to sustain the verdict, and that the Court, therefore, erred in denying the defendant's motion for a peremptory instruction in his favor, and also in overruling his motion for a new trial, based upon the insufficiency of the evidence; and it is especially urged in the brief of appellant that the death of John Wyant is not shown by the testimony adduced at the trial. But a careful consideration of the evidence leads us to a different conclusion. The evidence discloses that Wyant was an unmarried man, and for some years prior to June 9, 1892, had resided alone upon his farm, about five miles southwest of the village of Spangle, Spokane county, and some 18 or 20 miles from the city of Spokane. He was supposed to have considerable means, and, owing to his peculiar custom of always converting his money into coin it was generally rumored and believed among his acquaintances that he was hoarding his money by burying it. He was seen at work in one of his fields on the afternoon of the day above mentioned, but was never seen or heard of alive afterwards. On the evening of that day, at half past ten o'clock, his barn which was situated some distance from his house, was, by Mrs. Morris, discovered to be on fire. She aroused her husband, and he and some of his neighbors went to Wyant's premises. Soon after they arrived at the burning building, they discovered what they supposed to be the form of a human being in the midst of the flames, lying in that portion of the barn where hay was usually kept. Other neighbors were called, and, after satisfying themselves that what they had before believed to be a human body was in fact such, they proceeded to examine the premises. Upon entering the house, they found the dining table with dishes upon it, which had been used, but were unwashed; a chair near it, and a diary, such as Wyant always kept, lying open upon the table, containing a brief account of what he did on the 9th day of June; and egg shells upon the hearth of the stove. Nothing in the house

appeared to have been molested, and, judging from appearances, Wyant had eaten his supper, and at once left the room. Further investigation developed the fact that his riding horse was missing from the pasture where he was kept and where the other horses were found. In the morning, the fresh tracks of the missing horse were traced past the house of Mr. Rohweder to the end of the lane. From there, instead, of following the usually traveled road to Spokane, which passes through Spangle, the tracks indicated that the horse took a short cut, which was rough and but little traveled, and which was known to the appellant. On the evening of June 10th, this horse was found on the usually traveled road between Spokane and Spangle, about seven miles south of Spokane, and was going towards home. He was also seen and recognized at Spangle, and appeared to have been ridden hard, having dried sweat and saddle marks upon him. The tracks of this horse were easily identified and followed, on account of the fact that there was a peculiarly shaped notch in one of his hoofs. The Coroner, having been sent for, went to the Wyant farm the morning after the fire, accompanied by Dr. Hoxie, and held an inquest on the body, which was still lying untouched in the ruins of the barn. It was found that the legs of the deceased to the knees and the arms to the elbows had been entirely consumed by the fire, and the remaining portion of the body was greatly charred and blackened, and covered with a coating of ashes, which seems, in a measure, to have preserved it from further consumption. The general outlines of the face had not been destroyed, and, owing to the fact that a cloth around the neck had been saturated with blood, it had not burned, and it was discovered that the throat had been cut, as the witnesses expressed it, from ear to ear. In the stomach undigested eggs were found, and it was shown that Wyant was in the constant habit of eating eggs. A bullet had passed through the head from left to right, just above the ears, and another had apparently pierced the abdomen. It was thus made apparent that a heinous crime had been committed. Somebody had evidently been killed by violence inflicted by another. Who was it? Several of the neighbors and intimate friends of John Wyant swore positively that it was he, and the jury so found, and, we think, rightly. Some of the witnesses recognized the body as that of Wyant by the peculiar shape of the head and face. Others knew him by the absence of a certain tooth and by a certain front tooth which stood alone. A quid of tobacco was found between the lip and the teeth of the corpse, and one of the witnesses testified that Wyant habitually held his tobacco in that peculiar manner; and they all agreed that the curly hair which was found unburnt on the back of the head resembled that of John Wyant. With all of this evidence before them, the jury could hardly have arrived at the conclusion that the death of John Wyant was not proven beyond any reasonable doubt.—*N. Y. Law Journal.*

ABSTRACTS OF RECENT DECISIONS.

It has been held by the Supreme Court of Rhode Island that "when a seller falsely and fraudulently warrants bonds to be of a certain value, and the buyer—having no knowledge of, nor any present facilities for learning, their real value—relies solely on such warranty, the rule of *caveat emptor* does not apply;" also that, "a seller's false statement that the stock he is offering has always paid a certain rate in dividends is a positive statement of a material fact, on which the buyer has a right to rely."

A writer in a recent number of the Green Bag recalls an anecdote of Justice Byle, author of a famous work on "Bills," and owner of a famous horse named "Business." "Mr. Sergeant Byle's horse," the note says, was as dear to him as his practice, and he often absented himself from chambers to enjoy its society. If a client happened to call on any of these occasions he was gravely informed that Mr. Sergeant Byle was 'away on business.'"

Dogs have been the subject of many interesting law suits and the tendency is in favor of the animal. In a recent case in New York Supreme Court, Kings county, an ordinance authorizing a police magistrate to order the killing of a dog without notice to the owner of the dog is held to be void on the ground that it professes to authorize judgment without the constitutional requirement of a judicial hearing. The same case declares that a statute authorizing a Common Council to pass an ordinance to regulate and license dogs confers no power to pass an ordinance to kill them.

The owner of property on the side of a street sometimes suffers damages (by a grading of the street), to an extent amounting almost to the destruction of his property. It has frequently been held that the first establishment of a grade, even if the street was much lowered or raised, was something which the owner of the property must have had in view when the property was sold or dedicated for street purposes, and that damages caused by this gave no right to compensation, even if a subsequent change of grade might do so. But a recent Missouri case, *Hickman vs. City of Kansas*, 28 L. R. A. 658, holds that for the first grading, as well as for subsequent changes of grade, the owner is entitled to compensation in case his property is damaged. The case is annotated by reviewing the other authorities on this question.

The duties of a public prosecutor are well stated in the following remarks by ex-Judge Gunning S. Bedford:

"From my experience, it seems to me that the duties of a public prosecutor are two-fold. His first duty is to acquit the innocent; his second duty is to convict the guilty. It is very remarkable the different opinions people have regarding a public prosecutor; some regard him as thirsty for blood of his prisoners, pressing and striving for victory rather than justice; others are of the opinion that a public prosecutor, to be great, must win every verdict, be it right or wrong, and I regret to say that there have been a few prosecutors who have lived and died under that erroneous impression."

The decision holding the famous South Carolina Dispensary Law to be unconstitutional is very elaborately reported, including the briefs of counsel, in 33 L. R. A. 410. The case is entitled *McCullough vs. Brown*. The Supreme Court of South Carolina hold that what is called the police power of the State, while it justifies laws to restrict the sale of intoxicating liquors, or even to prohibit such sales altogether in the interest of the public good, does not justify or have any application to the Dispensary law, because the court holds that this law does not aim either to prohibit or restrict such sales, but merely to give a monopoly of the business to the State. The power of a State to embark in trade and commerce to the extent of buying and selling any article for profit is denied, even if there is no express provision of the State constitution against it.

That an enrolled bill on file in the office of the secretary of state must be accepted by the courts as a regularly enacted statute is declared to be the law in the State of Washington, in *State, ex rel. Reed vs. Jones*, 23 L. R. A. 34. The difficulty in this question and the contradiction and vacillation of the courts on the question are shown in the annotation to the case. One line of decisions proceeds on the theory that the legislature must be presumed to have done its duty, and to have complied with the constitution in the passage of a statute; the other, reaching an opposite conclusion, is based on the doctrine that the constitution must be followed, else the statute will not be valid. The following out of these doctrines results, in many decisions, on the one hand to the effect that the courts cannot go behind the enrolled bill to determine whether it was regularly passed or not, while many other decisions reach directly the opposite conclusion.

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There is a case on its way to the Supreme Court from Lucas County Common Pleas, which involves the validity of the act of the General Assembly, passed a few years ago, prohibiting the importation of cattle from certain parts of the South during certain periods of the year, as such cattle are supposed to be infected with the germs of a disease known as the "Texas fever." A similar law was enacted in Missouri, but the Supreme Court of that state held it to be illegal as in contravention of the Inter-State Commerce Act. That point was urged and argued in the case first mentioned, but the court sustained the Ohio law, as being within the power delegated to the state for reasonable police regulation.

Injunctions in behalf of the American, Wells-Fargo, United States, and Adams Express Companies and the Western Union Telegraph Company, issued by the United States Court, at Cincinnati, have been served upon county auditors throughout the State, restraining them from proceeding under the Nichols tax law. The action proceeds, it is inferred, upon the strength of Judge Taft's decision, holding that law to be unconstitutional. Our Supreme Court, as is well known, takes another view of the case and has declared the law to be constitutional. It now remains for the United States Supreme Court to say which of these decisions is correct. The case belongs to the class in which the United States Circuit, or Supreme Court, is not bound by the construction or decision of the State Court relative to a statute of the State, and as it may, under the rules of practice in the United States Court, be taken directly to the Supreme Court from the United States Circuit, it is hoped that the important questions involved may be finally adjudicated at an early date.

The Liquor Dealers' Protective Association and two or three retail dealers in tangle-foot, individually, are defendants in a novel suit commenced quite recently in the Lucas County Common Pleas Court. It will present all the phases, moral and otherwise, from brewer to drunkard and injured wife, in addition to its legal aspects. The facts, as they appear in the petition, are that the plaintiff was at one time an habitual drunkard; his wife notified certain saloon keepers to refrain from selling him liquor; subsequently she brought suit against one of them, who is also defendant in the present action, for damages sustained by reason of his disregarding such notice. In the meantime, it would seem, the husband braced up enough to secure employment in a brewery (we are not certain just how much that means) at \$50 per month. It was then, the petition indicates, that the liquor dealers' association began to "protect" itself and avenge the wrongs which one of its members had suffered at the hands of the woman who was trying to rescue a drunken husband. The notice she had served on the saloon keeper, protected, by the way, from publication by statute, was published in printed form and verbally, and the liquor dealers' association threatened to boycott the brewery unless the unfortunate man was discharged. The result is that he has lost his position and now brings suit for \$5,000 damages.

The New York convention for revision of the constitution has finished its work and has issued an address to the voters of the State, commending the product of its labor to their consideration.

Most of the amendments, thirty-one in number, submitted to the voters for ratification or rejection, bear upon issues pertinent only to local affairs, but there are others that prescribe for diseased conditions that exist elsewhere than in the Empire State. Were it certain that a constitutional convention for Ohio would act as wisely as that of New York, it might be well to hasten the time of its assembling.

It is a fact well known to all who have given the matter any thought, that the constitution of Ohio is a back number. Civilization has advanced greatly within the past forty years, and new conditions have arisen, not contemplated by its framers, to which the constitution is now either inapplicable, or with which its provisions are out of harmony. By our system of tax levy, and in many other respects, the people are allowing themselves to be injured

annually by unjust burdens and unfair inequalities that could be easily leveled, if it were not for unwise restraints of an out of date fundamental law. It is hoped that the example of the State of New York may be contagious, and that our people may soon become awake to their own interests in this important matter. The bar of the State will be a very potent factor in securing the needed revision of the instrument.

The New York convention recommends a constitutional provision that all appointments and promotions in the civil service of the State are to be based upon merit, and ascertained, so far as possible, by competitive examination. In this recommendation all the Republican members and a majority of the Democratic members united. The recent scandals in the public service of New York are likely to lead the voters to the adoption of what seems to be the only preventive of their recurrence.

The constitution devised by the convention will be approved or rejected by the people at the next election, and it is quite possible that more important results depend upon the fate of the constitution than upon that of any or all of the candidates.

ARE STRIKES LEGAL?

The United States Court of Appeals has rendered a decision in the Northern Pacific injunction case, which in part reverses the famous anti-strike order of Judge Jenkins' and in part sustains it. That part of the injunction which restrained the employees of the road from striking, or, in the language of the injunction "from so quitting the service of the said receivers, with or without notice, as to cripple the property or prevent or hinder the operation of the road," the Court of Appeals declares was a violation of the rights of the employees, who could not legally be restrained from leaving the employ of the receivers and the company, when they saw fit to do so, whether they quit in a body or individually. That part of the injunction which restrained the employees from entering into a combination or conspiracy to quit with intention of crippling the property or preventing the operation of the road is sustained. On the whole the decision, which was read by Justice Harlan, who presided over the court, is a clear recognition of the right of the employees to strike.

The decision says that the injunction against employees quitting so as to cripple the property

or prevent or hinder the operation of the road was equivalent to a command of the court that they should remain in the active employment of the receivers and perform the service appropriate to their respective positions, until they could quit without crippling the road. The time when they could quit was not indicated by the order of the court.

No attempt was made, to lay down a rule applicable to every case that may arise between employer and employee; but, while an employee who quits without cause and in violation of an express contract to serve for a stated time, would be guilty of a wrong a court of equity could not properly by injunction prevent one individual from quitting the personal service of another.

It would be an invasion of one's natural liberty to compel him to work for or remain in the personal service of another. One who is placed in such restraint is in a condition of involuntary servitude—a condition which the supreme law of the land declares shall not exist anywhere within the jurisdiction of the United States.

The decision then discusses whether the fact that the property involved was a railway, with public duties to perform, gave the court the right to restrain the men from quitting. The receivers, the decision declares, had the right to make a new schedule of wages and offer it to the men with the alternative of accepting it or quitting the service. The men had the right to accept or refuse and to quit if they were not willing to work for less wages. The court should have eliminated the words "and from so quitting the service of the said receivers, with or without notice, as to cripple the property or prevent or hinder the operation of the road."

But as to combining and conspiring to quit, with or without notice, the service of said receivers with the object and intent of crippling the property in their custody or embarrassing the operation of the road, the court sustained the injunction, and held that there was a distinction between simply quitting the services of a road on account of a reduction of wages, and a conspiracy among dissatisfied employes and others co-operating with them such as would physically disable and render unfit for use the cars and other property in the hands of the receivers, and by force, threats, and intimidation used against employes remaining in the service, and against those desiring to take the places of those quitting, would prevent the receivers from opera-

ting the road. Justice Harlan said: "The general inhibition upon combinations and conspiracies formed with the object and intent of crippling the property and embarrassing the operations of the road, must be construed as referring to acts of violence, intimidation and wrong.

We do not interpret the words last above quoted as embracing the case of employes who, being dissatisfied with the proposed reduction of their wages, merely withdraw on that account, singly or by concerted action, from the service of the receivers, using neither force, threats, persecution nor intimidation toward employes who do not join them, nor any device to molest, hinder, alarm or interfere with others who take or desire to take their places.

The employes having taken service, first with the company, and afterwards with the receivers, under a general contract of employment which did not limit the exercise of the right to quit the service, their peaceful co-operation, as the result of friendly argument, persuasion or conference among themselves, in asserting the right of each and all to refuse further service under a schedule of reduced wages, would not have been illegal or criminal; although they may have so acted in the firm belief and expectation that a simultaneous quitting without notice would temporarily inconvenience the receivers and the public. If in good faith and peaceably they exercise their right of quitting the service, intending thereby only to better their condition by securing such wages as they deem just, but not to injure or interfere with the free action of others, they can not be legally charged with any loss to the trust property resulting from their cessation of work in consequence of the refusal of the receivers to accede to the terms upon which they were willing to remain in the service.

Such a loss, under the circumstances stated, would be incidental to the situation and could not be attributed to employes exercising lawful rights in orderly ways, or to the receivers who, in good faith and in fidelity to their trust, declared a reduction of wages and thereby caused dissatisfaction among employes and their withdrawal from service."

The justice also found fault with Judge Jenkins' definition of a strike. The definition was "a combined effort among workmen to compel the master to the concession of a certain demand, or preventing the conduct of his business." This definition and the injunction, the court holds, were not sufficiently specific in respect to strikes. The court was not prepared

to sustain the view that strikes are necessarily illegal or criminal.

The decision of Judge Ricks in the Ann Arbor case, the court held, not that employes had no right to strike, but that they had no right to abandon a train at an out of the way place on the line of railroad, and leave it so as to jeopardize the property of the employer, or the lives or interests of innocent people.

This decision has been recently sustained by the United States Circuit Court of Appeals at Cincinnati, Ohio, the opinion being rendered by Judge Severance, of the Western division of Michigan. Associated with him were Judge Berton of the United States Circuit Court of Appeals and Judge Sage of the Southern district of Ohio.

COUNSEL AND CLIENT.

In a state of barbarism every man's hand is against his neighbor, and personal advantage sets the only limit to his privileges and his duties. With the first gleam of civilization these privileges are circumscribed by his duty toward others, from which no individual is entirely free. In such a society what, then, may a lawyer do in behalf of his client without infringing his duty to the public, and without regard to the inherent justice of his cause? This is a question oft mooted, both by the profession and the laity, and the extremes are wide apart. Memorable on the one hand are Lord Brougham's hot words uttered in the defense of Queen Caroline, the unhappy wife of George IV.: "An advocate in the discharge of his duty knows but one person, and that person is his client. To save his client by all means and expedients and at all hazards and costs to other persons—and among them himself—is his first and only duty; and in performing that duty he must not regard the alarms, the torments, the destruction he may bring upon others. Separating the duty of the patriot from that of the advocate, he must go on, reckless of consequences, though it should be his unhappy lot to involve his country in confusion." These words show zeal but no discretion; they are commanding, but not convincing. All society is founded on the theory, at least, of the greatest good to the greatest number, and such a code as this is utterly subversive of this fundamental principle. In criminal trials, especially, too often the prosecution seeks to secure a conviction by any means, and the defense, we may assume, usually stops at nothing to escape the

penalty of wrong-doing. If the public be aroused to participation and clamor in favor of one or the other, the advocate may find himself unduly swerved, and may seek to gratify such public sentiment to the detriment of public justice. Cases involving the freedom of the life of the accused demand in the lawyer a far-seeing discrimination and an all-inclusive view. He may be required to face the indignation of a frowning but unthinking community, and to maintain his integrity at the sacrifice of popularity or ambitions. On the other hand, his recreance to duty may entail the most unfortunate results. A crime is committed which justly outrages public sentiment, and through sharp practice or corrupt methods the perpetrator goes unpunished, his freedom from restraint, even his existence, involves the peace-loving portion of the community in constant apprehension; then indignation bursts all bounds; the law's delays and loopholes are made the excuse for defiance of all law, and property and life pay the penalty of one man's overzeal in behalf of a worthless client.

Opposite to Lord Brougham's position is that of Sir Matthew Hale, who in his early practice would never accept a seemingly unjust cause. But in after life he was convinced that in this he had in a measure erred, for he felt that no one can so thoroughly know a case as to be entitled to a final opinion on its merits until all the facts are thoroughly presented. In every life questions of moral duty arise for daily settlement; paths constantly diverge, and the safe one must hourly and anew be chosen. There is no universal standard; each conscience must settle some things for itself unaided but by an enlightened understanding. One thing positively, however, a lawyer may never do for his client—what the common conscience of mankind would forbid that client to do for himself. He may not espouse the cause of one who seeks to perpetrate a wrong through some chance advantage the law may happen to afford him. But not often, if ever, need a lawyer decline to undertake the defense of the accused. To undertake his defense, however, is not to decide to make every conceivable effort to save him from conviction; that might include, at last resort, the purchase of perjured testimony in his behalf, which even the most hardened might resort to, but would hardly seek to justify. But to secure to him those advantages and safeguards which the law, in mercy, offers him, is permissible and

just. If more than this be expected or required, but one honest course is open—to decline peremptorily the proffered employment and forego the longed-for fee. Honest men decline opportunities for dishonest gain in every walk in life. However, by declining to espouse a cause because there seems to be ground for believing the party guilty, the lawyer would usurp the function of both judge and jury. The Courts appoint attorneys for accused persons in extremity, and where the issue is life or death, counsel thus appointed cannot refuse the trust, so jealous is the law of the security of its subjects, and so averse to judgment against anyone unheard. Sydney Smith justifies the acceptance of any ordinary case that offers, on the ground that truth is best arrived at by the earnest efforts of opposing advocates, and this proposition is no doubt true enough if the contestants use only legitimate weapons.—*American Journal of Politics*.

It has been decided by the Supreme Court of Oklahoma that the Probate Courts of that salubrious divorce climate have no power to untie matrimonial knots. The complications and wretchedness to follow are suggested in the following from the *Wichita Mirror*:

"The Supreme Court of Oklahoma has by a late decision put about five hundred former litigants of her territory in a miserable stew by denying the power of the Probate Court of the territory to grant a divorce. Restless married folks from Maine to Georgia and from Long Island to San Francisco, who have crossed lakes, rivers, mountains and plains, to enjoy the luxury of Oklahoma's generous divorce laws, and have in silent confidence gone into her Probate Courts and carried away, without great publicity, the much coveted decree of divorce and have slept and probably married again in fancied security, now awake to find the gaping wounds of the old discontent torn asunder again by the thoughtlessness of the Supreme Judges who now hold that the decree is a worthless-remembrance of foreign folly. The consequences of this decision can scarcely be measured, as these litigants are scattered all over the States of the Union. It is but another result of reckless legislation, laden with disaster."

It is reported that in a recent examination of applicants for admission to the Bar of Ohio, the following question was put to one of the candidates:

What is bigamy? Answer (given verbatim et literatim): "A pretend marag by man or woman to one of the opposite sect, having at the time a living companion."

SUPREME COURT.

A case of unusual interest was handed down by the Supreme Court this week testing the constitutionality of the law creating an insolvency court in Hamilton county, passed by the legislature last winter. The style of the case was, Ohio on the relation of Henry T. Fay v. R. M. Archibald, sheriff of Hamilton county. Through a seemingly defect in the law it provides for the election of an insolvency judge on the first Tuesday after the first Monday in April. The sheriff declined to issue a proclamation for the election and mandamus proceedings were instituted to compel him to perform this duty. A demurrer was filed and the act is incidentally attacked, it being claimed that the proposed Court will assume powers vested in the Probate Court. Of course, it would create an expense of probably \$15,000 in Hamilton county to carry on this special election. The Supreme Court held the law to be valid, with the exception of Judge Dickman. The case will be reported, but as usual no syllabus or opinion was handed down at the time.

A case of interest was argued in the Supreme Court last week by attorney Mack, of Cincinnati, under the style of Jacob Weller v. The State of Ohio, on a motion for leave to file a petition in error. Weller was convicted of selling adulterated vinegar and fined. The case has been fought stubbornly in the courts below and the outcome will be watched with interest. He was indicted for using certain chemicals, during the broiling process, by which he gave the vinegar a "Romanish color." The motion was allowed.

Canal Commissioner Rownd has addressed a letter to Attorney-General Richards requesting him that he bring suit against John Schenck who owns land abutting the Scioto river. It is claimed that he has been encroaching on the river channel. The maps of the city show the same boundary as that of the Canal Commission. In 1828 the state built a dam and appropriated the channel. Since then, the State Canal Commission claim it is a part of the board of public works. Twenty-two other property owners also are interested in the suit. No doubt other suits will follow.

New Cases Filed.

4204. Chas. W. Babb et al. v. the City of Cincinnati. Error to the Circuit Court of Hamilton county. M. W. Conway, Cincinnati, for plaintiff, and Porter & Rendigs and W. E. Brooks, Cincinnati, for defendant.

4205. John W. Smith, guardian, v. Geo. W. Carver et al. Error to the Circuit Court of Miami county. W. B. McKinney, Troy, for plaintiff, and H. H. Williams, Troy, for defendant.

4206. The Cleveland, Cincinnati, Chicago & St. Louis R'y Co. v. John V. Newton. Error to Circuit Court of Hancock County.

4207. Village of Tippecanoe vs. John W. Underwood. Error to the Circuit Court of Miami county.

4208. Peter J. Cory v. Abram Sharp. Error to the Circuit Court of Fayette county. D. I. Worthington, H. M. Daugherty and A. R. Creamer, Washington C. H., for plaintiff, and J. W. Mooner, Columbus, for defendant.

4209. The Missionary Society of the M. E. Church v. Heman Ely et al. Error to the Circuit Court of Lorain county. C. E. Pennewell and Webber & Stroup, Elyria, O., for plaintiffs. Boynton & Horr and E. G. Johnson, for defendants.

4210. Mary L. Reynolds v. Isaac Walker. Error to the Circuit Court of Morrow county. Mitchell & Bruce, Mt. Gilead, for plaintiff; Olds & Olds, Mt. Gilead, O., for defendant.

4211. Charles A. Long v. Charles C. Minner. Error to the Circuit Court of Muskingum county. Winn & O'Neal Zanesville, for plaintiff; W. H. Ball and J. T. Crew, Zanesville, for defendant.

4212. The Wheeling & Lake Erie R'y Co. v. Jacob Rebman. Error to the Circuit Court of Medina county. Swayne, Swayne & Hayes, Toledo, counsel for plaintiff.

4213. Jacob Hammel v. Thos. W. Palmer and Margaret H. Anthony. Error to the Circuit Court of Huron county. T. H. Kellogg and Stewart & Row ey, Norwalk, for plaintiff. J. K. Hamilton for defendants.

4214. Wm. McFarlin et al. v. The Painesville National Bank, The King Varnish Co. and the Citizens' Savings and Loan Association of Akron, O., et al. Error to the Circuit Court of Summit county. Chas. Baird, W. H. Upson and D. L. Marvin, Akron, for plaintiffs; Oviatt, Allen & Cobbs, Marvin, Sadler & Atterholt, Green, Grant & Sieber, Kohler & Musser, G. M. Anderson, Chas. Baird and E. F. Voris, Akron, for defendants.

4215. The Citizens' Savings & Loan Association of Akron, O., v. William Taylor Son & Co. et al. Error to the Circuit Court of Summit county. Baird & Voris, for plaintiff, Akron; Caskey & Callahan, Oviatt, Allen and Cobbs, Akron, for defendants.

4216. Katherine Keyle et al. v. Henry Feuchter and Henry Feuchter, Administrator. Error to the Circuit Court of Summit county. Baird & Voris, Akron, for plaintiffs; N. D. Tibbals, Green, Grant & Seiber, Akron, for defendants.

4217. William Peter v. The Union Manufacturing Co. et al. Error to the Circuit Court of Lucas county. Kinney & Newton, Toledo, for plaintiff.

4218. Jacob Brubaker v. D. F. Brubaker. Assignee, etc. Error to the Circuit Court of Ashland county. Byron Stilwell, Ashland, for plaintiff; H. A. Mykrantz, Geo. A. Nicol, C. J. Kenney and Campbell & Semple, for defendant.

4219. Benjamin F. Johnson and Elmer Johnson v. The Village of Ashland, Ohio. Error to the Circuit Court of Ashland county. Geo. B. Smith, Ashland, and Byron Stilwell, Ashland, for plaintiffs. Defendant's attorneys not given.

4220. Mary Loretta Martin and Elizabeth Martin v. Edmund Martin. Error to the Circuit Court of Brown county. D. C. Keller and Loudon & Waters, Cincinnati, for plaintiffs; G. Bantach & Son, Georgetown, for defendant.

4221. George L. Converse v. Henry J. Booth and Thomas J. Keating. Error to the Circuit Court of Franklin county. L. J. Critchfield, Columbus, for plaintiff.

— The State of Ohio on the relation of A. C. Robeson v. Henry C. Jacobi, Sheriff of Darke county, Ohio. Motion for a writ of Mandamus.

Supreme Court Decisions.

Tuesday, October 2.

2404. Simon Obermayer v. B. H. Lindemann. Hamilton County. Judgment affirmed.

2828. Elizabeth C. Estabrook v. J. C. Roy. guardian, etc. Shelby County. Dismissed for failure in service.

3539. Charles H. Schrader et al. v. the State of Ohio. Monroe County. Affirmed on authority of Calvin vs. State, 12 O. S. 60.

3795. Anna Davis, administratrix, v. The Cleveland, Lorain & Wheeling Railroad Company. Belmont County. Affirmed.

3712. The C., H. & D. Railroad Company v. Daniel W. Struble. Wood County. Judgment affirmed.

C. E. Kelly et al. v. W. H. Briggs et al. Union County. Judgment affirmed.

Emile Kahn et al. v. H. J. Reedy, etc. Hamilton County. Dismissed by consent.

The T. & O. C. Railroad Company v. James O. Fowler et al. Delaware County. Dismissed by consent.

CONFLICTING STATE AND FEDERAL JURISDICTION.

Creditor's Suit on Judgment of State Court—Estoppel—Concealment of Conveyance by Debtor.

(United States Circuit Court, N. D. Iowa, June, 1894.)

BACON ET AL. against A. W. HARRIS ET AL. Suit to set aside certain bills of sale as being void against creditors. Park & Odell for complainants; O. J. Clark & Swan, Lawrence & Swan for defendants.

SHIRAS, District Judge.—The facts in this case, as gathered from the evidence, appear to be as follows: At and previous to the year 1886, A. W. Harris was engaged in the business of buying and shipping grain at Manley, Iowa, and subsequently at Sibley, and other points in northwestern Iowa. In 1886 he associated with himself a partner named Kunsdon, and the business was conducted under the firm name of Harris, Kunsdon & Co. until in April, 1889, when Harris bought out the interest of Kunsdon in the firm, and in the same month he admitted as partners J. W. Orde and R. A. Harbord, who were then the cashier and president of the Sibley Exchange Bank, the business being done under the firm name of A. W. Harris & Co. until the spring of 1891, when said Orde and Harbord withdrew from the firm, the business thereafter being conducted by A. W. Harris, under the name of A. W. Harris & Co., until April 6, 1893, when he failed and suspended business, having at the time elevators or warehouses at Sibley, Archer Grove and Ocheyedan, in Iowa. During this time, the complainants, who were commission merchants, residing at Milwaukee, Wis., had from time to time advanced money to said Harris and his partners to be used by them in the purchase of grain; and on the sixth day of April, 1893, when Harris finally suspended, there was due to complainants from him the sum of \$2,617.87, for which amount Harris confessed judgment in favor of complainants in the District Court of Osceola county, Iowa, under the date of May 12, 1893, in accordance with the provisions of the Code of Iowa, and judgment having been duly entered up, execution therein was issued to the sheriff of Osceola county, and by him returned unsatisfied. It further appears that the Sibley Exchange Bank was merged into the Northwestern State Bank of Sibley at some time prior to April, 1891, the exact date not appearing in the evidence; and on the 6th day of April, 1893, said bank suspended payment, and made an assignment of its property to H. E. Thayer. On the 11th day of April, 1893, the Attorney General of the State of Iowa filed a petition in the name of the State, against said bank, in the District Court of Osceola county, asking the appointment of a receiver to take charge of the property of the bank, and wind up its affairs; and on the 18th day of April an order was entered appointing H. E. Thayer a receiver, and authorizing him to take possession of the assets of said bank. It further appears that, about the time J. W. Orde and R. A. Harbord withdrew from the firm of A. W. Harris & Co.—that is to say, in the month of April, 1891—A. W. Harris

executed and delivered to the Northwestern State Bank of Sibley a bill of sale, in the nature of a mortgage, for the sum of \$25,000, conveying the steam elevator, appurtenances, furniture, coal house, etc., owned by said Harris at Sibley, Iowa; also the grain warehouse and appurtenances at Sibley; also elevator, appurtenances and coal house at Ocheyedan; also one-half interest in warehouse at Harris; also warehouse and appurtenances at Archer Grove, Iowa. This mortgage or bill of sale was not filed for record by the bank until the time when the bank suspended payment, in April, 1893, when it was recorded. The property remained in the possession and under the control of A. W. Harris until April 7, 1893. On that day H. E. Thayer procured the execution by A. W. Harris of two bills of sale, covering the elevators, warehouses, fixtures, furniture and grain owned by said Harris and located at Sibley, Ocheyedan and Archer Grove, it being the intent to cover by said bills all the property of said Harris at these places, the same constituting practically all the assets then owned by him. Thayer testifies that when he procured the execution of these bills of sale, he had no knowledge of the existence of the bill of sale previously executed to the bank, of which he was assignee. After the appointment of Thayer as receiver, he sold the greater portion of the property covered by the bills of sale executed by Harris, and reported the same to the District Court of Osceola county, by which Court the sales thus made were approved. On the 16th day of May, 1893, the complainants filed the bill in the present case, whereby they seek to set aside the bill of sale executed to Thayer, assignee, by A. W. Harris, on the ground that the Northwestern State Bank is estopped from asserting the existence of any indebtedness to it from Harris, as against complainants; that the said bank actively aided A. W. Harris in obtaining credit with complainants, and the advancement of moneys from time to time, by concealing the fact of the existence of the indebtedness to the bank, and the giving of a mortgage to secure the same.

The first question presented by the answer of Thayer, receiver, is as to the jurisdiction of the Court, it being averred that the State Court, having jurisdiction of the receiver and the property in his hands, has exclusive jurisdiction over all questions connected with the settlement of the affairs of the insolvent bank. It will be borne in mind that the real question at issue is between two creditors of A. W. Harris, as to their rights and equities in his assets. The State Court has not jurisdiction over his estate, as he has not made an assignment, nor has a receiver of his property been appointed. The ultimate question at issue is whether the bills of sale of the property of A. W. Harris executed to Thayer, as assignee of the Northwestern State Bank, are valid or invalid as against the claim and judgment of the complainants. The appointment of a receiver by the State Court of the property of the bank did not confer upon that Court jurisdiction over the estate or property of A. W. Harris. When the bill in this case was filed, the property covered by the bills of sale had

not been sold or converted into money, and the purpose of the bill was to obtain a decree adjudging these conveyances to be void as against the debt due complainants, and thus enabling complainants to secure a levy of execution upon the property. If the property had not been sold, no reason exists why this Court could not have proceeded to determine the question of the validity of the bills of sale executed by Harris, and the fact that the receiver has seen fit to sell the property during the pendency of this suit does not defeat the pre-existing jurisdiction. Even if it be true that the possession of the property, or the money which now represents it, is with the State Court, that does not defeat the jurisdiction of this Court over the respective equities and rights of the complainants and the bank, although it may affect the nature and extent of the remedy which can be granted.

Objection to the jurisdiction of this Court is further made upon the grounds that the Courts of the United States, sitting in equity, cannot give aid to the enforcement of judgments at law rendered in a State Court.

In *Taylor v. Bowker* (111 U. S., 110, 4 Sup. Ct., 397), a bill was filed in the United States Circuit Court for the District of Maine, for the purpose of enforcing the collection of a judgment rendered in a Court of the State of Maine and the relief prayed for was granted.

In *Tube Works Co. v. Ballou* (146 U. S. 517, 13 Sup. Ct., 165) it is said: "Where it is sought by equitable process to reach equitable interests of a debtor, the bill, unless provided by statute, must set forth a judgment in the jurisdiction, where the suit in equity is brought, the issuing of an execution thereon, and its return unsatisfied, or must make allegations showing that it is impossible to obtain such a judgment in any Court within such jurisdiction." The decision in that case was that a judgment in the State of Connecticut would not support the proceedings in equity in the State of New York, but, if I correctly interpret the ruling, it is to the effect that a judgment at law in any Court, State or Federal, in the jurisdiction in which the proceeding in equity is brought in the Federal Court, will meet the requirements of the rule that a party must exhaust his remedy at law before he can invoke the aid of a Court of equity. The main reason underlying the proposition that in the Courts of the United States a bill in equity will not be sustained in favor of one who is only a general creditor, and whose claim is unliquidated, are twofold: First, because of the fact of the existence of a just claim in favor of the creditor must be established by a judgment at law, or otherwise the debtor is deprived of his constitutional right to a trial by jury; and, second, because it must appear that the creditor cannot collect his claim at law before he can invoke the aid of a Court of equity, which is not primarily a Court for the collection of debts. It is the latter reason that requires the obtaining of a judgment in the jurisdiction wherein the aid of a Court of equity is invoked as a prerequisite thereto. A judgment rendered in any Court of competent jurisdiction would be suf-

ficient evidence of the existence and amount of the claim; but the rendition of a judgment in one State, and a return of execution unsatisfied, would only show that the judgment debtor did not have property in that State, and would not be evidence that he might not have property open to levy in other States. For illustration, a judgment rendered in the State of Nebraska, and a return of execution unsatisfied, is evidence showing the judgment at law cannot be collected in that State, but it is not evidence that the debtor has not ample property in the State of Iowa which may be reached by execution. Hence the need for obtaining judgment within the jurisdiction wherein the aid of the Court of equity is invoked, and, by return of execution, unsatisfying the need of equitable aid. This proof, however, may be furnished as well by means of a judgment in the State Court as by a judgment in the Federal Court, for the process by execution is as effective in the one Court as in the other; and therefore, if a party has obtained judgment in a State Court, and has issued execution, without being able to enforce payment thereof, he is entitled upon return of execution unsatisfied, to invoke the aid of a Court of equity, either State or Federal, sitting in the same State, of otherwise competent jurisdiction, for the enforcement of his rights; and, therefore, if the amount involved is sufficient, and the citizenship of the adversary parties is diverse, he may file a bill in the Court of the United States for the purpose of attacking conveyances of property which prevent the levy of an execution in the law action. I therefore hold that this Court has jurisdiction in the present proceeding, and the question for determination is whether the complainants are entitled to estop the Northwestern Bank and its receiver from asserting the validity of their claim to the assets of Harris which were described in the bills of sale executed under date of April 7, 1893.

According to the general principles that sustain the doctrine of estoppel by conduct, it seems clear that a creditor who unites with his debtor in concealing the fact of the indebtedness to him, and of the existence of a mortgage or bill of sale to secure the same, in being done to give the debtor a credit which he could not have if the truth were known, and to enable the debtor to obtain on credit money or property from third parties, may be estopped, from asserting his claim or when such estoppel is necessary to protect innocent third parties from being defrauded of the collection of the debts due them, and which are created in the belief that no lien or indebtedness existed in favor of the party sought to be estopped.

In *Blennerhasset v. Sherman* (105 U. S. 344) it was held by the Supreme Court that, "When a mortgagee, knowing that his mortgagor is insolvent, for the purpose of giving him a fictitious credit, actively conceals the mortgage which covers his entire estate and withholds it from the record, and, while so concealing it, represents the mortgagor as having a large estate and unlimited credit, and by these means others are induced to give him credit, and he

fails, and is unable to pay the debts thus contracted, the mortgage will be declared fraudulent and void at common law, whether the motive of the mortgagee be gain to himself for advantage to his mortgagor."

In the course of the opinion, the Supreme Court cited approvingly the following cases, to wit:

Hungerford v. Earle (2 Vern., 261), wherein it was held that: "A deed not at first fraudulent may afterwards become so by being concealed or not pursued, by which means creditors are drawn in to lend their money."

Also *Coates v. Gerlash* (44 Pa. St., 43), wherein it is said: "There is another aspect of the case, not at all favorable to the wife. It is that she withheld the deed of her husband from record until December 2, 1857. In asking that a deed void at law should be sustained in equity, she is met with the fact that she asserted no right under it—in fact, concealed its existence—until after her husband had contracted the debts against which she now seeks to set it up. There appears to have been no abandonment of possession by her husband. Even if the deed was delivered on the day of its date, the supineness of the wife gave to the husband a false credit, and equity will not aid her at the expense of those who have been misled by her laches."

Also *Hilliard v. Cage* (46 Miss., 309), wherein the principal circumstance relied on to avoid a deed of trust was the fact that the grantor retained possession of the property, and the deed was withheld from record, and the mortgagor was enabled to contract debts upon the presumption that the property was unencumbered, the Court declaring: "That the natural and logical effect of the agreement and assignment, and the conduct of the parties the other, was to mislead and deceive the public, and induce credit to be given to the mortgagor which he could not have obtained if the truth had been known; and, therefore, the whole scheme was fraudulent as to subsequent creditors, as much so as if it had been contrived from that motive and for that object."

Also *Gill v. Griffith* (2 Md. Ch., 270), wherein it was held that a party cannot be permitted to take a bill of sale or mortgage of chattels from another for his own security, leave the mortgagor in possession and ostensibly the owner, and at his request, and to keep the public from a knowledge of its existence, withhold it from the record an indefinite period, renewing it periodically, and then receive the benefit of it by placing the last renewal upon record, to the prejudice of others whom the possession of that very property by the mortgagor has induced to confide in him.

Also *Hafner v. Irwin* (1 Ired. 490), wherein a deed of trust was withheld from record, and was therefore held void as against creditors.

Also *Neslin v. Wells* (104 U. S., 428), wherein a mortgage was given to secure part of the purchase money, and it was held that the failure to record the same "constituted such negligence and laches as in equity requires that the loss which in consequence thereof must fall on one of the two, shall be borne by him through whose fault it was occasioned."

This question has been recently considered by the Supreme Court of Iowa, in the case of *Goll & Frank Co. v. Miller* (54 N. W., 443), wherein the facts are very similar to those in the case at bar. It therein appeared that one Miller had, at different times, executed chattel mortgages upon his stock in trade to J. L. Nicodemus. These mortgages were not recorded. On the 16th day of June, 1890, Miller executed a bill of sale of his stock to Nicodemus, who took possession of the property. Subsequently, other creditors filed a bill in equity, averring that they were entitled to priority over Nicodemus, by reason of the fact that he had withheld the previous mortgages from record, thereby misleading them into giving credit to Miller. After stating the facts, the Court said: "It is charged that the withholding of the mortgages from record was a fraud as to the plaintiffs, and this is the principal question in the case. There can be no doubt that the withholding of the mortgages from record, in pursuance of an agreement between the parties, could have but one object, and that was to maintain the credit of Miller, and lead parties with whom he dealt to give credit to him, in the belief that he was not a chattel mortgage merchant. In such a case it is well settled that the mortgagee cannot be permitted to insist on the validity of his mortgage, as against those who have given credit to the mortgagor under such circumstances. Such a transaction is fraudulent as to the other creditors. * * * There are several grounds upon which it is claimed by counsel for the defendant that the rule above announced should not be applied to this case. The principal contention turns upon the alleged fact that the taking of a bill of sale, on the 16th day of June was an entirely new transaction; that the debt to Nicodemus was an honest obligation; and that, being a *bona fide* creditor, he had a right to secure his claim, even if it resulted in the bankruptcy of Miller. This is true if the bill of sale was the only act of Nicodemus which prevented the plaintiffs from securing their claims. But the bills of sale could not purge the several mortgages of their fraudulent character. The mischief was done by withholding the mortgages from the record. It is fair to presume that, if the mortgages had been placed on record, the plaintiffs would not have been creditors of Miller."

The conclusion reached was that, upon the facts of the case, it must be held that the bill of sale was void as against creditors who had been misled by the failure to record the pre-existing chattel mortgages.

The principles thus announced by the Supreme Court of Iowa and the Supreme Court of the United States are decisive of the case now before the Court. The evidence shows that J. W. Orde and R. A. Harbord, who were the president and cashier of the private bank known as the Exchange Bank of Sibley, became partners in the grain business carried on under the name of A. W. Harris & Co. The Exchange Bank was merged into the Northwestern State Bank, J. W. Orde being president and R. A. Harbord cashier thereof.

In April, 1891, a bill of sale, in the nature of a chattel mortgage, was executed and delivered to the Northwestern State Bank, which covered substantially all the partnership property. The mortgage was not recorded until April 6, 1893. The reason why it was so withheld from record could have been no other than the one given by Harris in his statement to the agent of complainants, in which he stated that it was withheld from the record because it would hurt his credit if it was filed, and the bank assented to his request not to record it. Having thus aided Harris in obtaining a false credit from complainants and others, the bank cannot now be permitted to assert that it has a debt and lien superior in equity to the claims of those whom it aided in defrauding. It needs no elaboration of the facts to show that the bank is estopped from asserting any rights as against complainants under the bill of sale executed in April, 1891. It is, however, claimed that the bills of sale executed to Thayer, assignee, in April, 1893, have no relation to the bill of sale withheld from the record, and the invalidity of the latter cannot affect the former; that when Thayer, as assignee, procured the execution of the bills of sale to himself he had no knowledge of the existence of the first bill of sale; and that, as assignee, he had the right to take the bills in payment of the indebtedness actually due the bank of which he was assignee. Thayer, as assignee of the bank, was not an innocent purchaser for value. He succeeded to the rights of the assignor, but took its property subject to all rights and equities in favor of third parties. If the complainants had the right to estop the bank from asserting a superior claim to the assets of A. W. Harris, the same right existed as against the assignee of the bank. Therefore, the question is just as it would have been had the bank, previous to its assignment, taken the bills of sale now relied on under the circumstances shown in the evidence. The wrong and fraud committed against third parties by withholding knowledge of the existence of the chattel mortgage and the debt secured thereby is not obviated by the mere device of securing a new mortgage or bill of sale, as is well shown in the opinion of the Supreme Court of Iowa in *Go'l & Frank Co. v. Miller* (*supra*). The inequity chargeable against the bank is that it aided the debtor in concealing his real condition, and in obtaining a false credit, thereby misleading others, and inducing them to extend a credit which would not have been given had the truth not been concealed. The loss resulting from this conduct must fall upon one of the parties, and equity requires that it shall be visited upon the one whose misconduct has caused the loss.

The evidence shows without dispute that A. W. Harris is justly indebted to complainants in the sum of \$2,617.87 and interest, for advances made him in aid of his business. This debt has been reduced to judgment, and complainants are, therefore entitled to subject the property of the judgment debtor to levy of process for the collection of the judgment.

The property of the debtor Harris was found in the possession of H. E. Thayer, who claimed the right thereto as the assignee of the Northwestern State Bank, under the bills of sale executed to him, as assignee, by A. W. Harris. To substantiate the claim that Thayer stands as an innocent purchaser, under the bills of sale to him, it would be necessary to prove that he paid value for the property. There is nothing in the evidence to show that Thayer personally paid anything therefor, and there is nothing to show that Harris was in fact indebted to the bank. The bills of sale to Thayer, as assignee, recite the payment in the one of \$1,500, and the other of \$10,000, as a consideration for their execution; but these recitals are not evidence as against the complainants (*Silliman v. King*, 36 Iowa, 207; *Boone v. Chiles*, 10 Pet., 177). There is nothing to show, and it is not claimed, that Thayer paid any consideration to Harris when the bills of sale were executed to him and the only consideration therefor must be found in the existence of an indebtedness from Harris to the bank, and this is not proven by competent evidence. The witnesses assume the existence of the fact, but none testify thereto, and there is really no evidence from which it can be determined that there was an indebtedness for any given sum from Harris to the bank at the date when the bills of sale were executed to Thayer, as assignee of the bank. Under these circumstances, it must be held that the bills of sale executed by A. W. Harris to H. E. Thayer, as assignee of the Northwestern State Bank, under the date of April 7, 1893, are invalid as against the complainants, and that the property taken possession of by said assignee, and described in said bills of sale, was liable to be levied on and sold in satisfaction of the judgment in favor of complainants, against A. W. Harris, entered in the District Court of Osceola County, Iowa; that the said property having been sold and converted into money by said Thayer, after the bringing of this suit, the money in his hands stands in equity in place of the property, and so much thereof as is necessary is properly applicable to the payment of said judgment, interest thereon and the costs of these proceedings, and the complainants are entitled to a decree accordingly. As it has been urged in argument that a decree of this Court would be ineffectual, because the money realized from the sale of the property of A. W. Harris has passed into the possession of the State Court in the proceedings against the Northwestern State Bank, it may not be out of place to suggest that, if the money in fact has been paid into or placed under the control of that Court, then the complainants herein should apply to that Court for an order directing that so much of the money realized from the sale of the property of A. W. Harris as is needed to pay off the judgment, interest and costs in favor of complainants be so applied, the motion being based upon the decree in this case; and thus the rights of the parties will be protected without conflict between the different Courts.

--[From N. Y. Law Journal.]

SUPREME COURT OF OHIO.

January Term, A. D., 1894.

CASES ASSIGNED FOR ORAL ARGUMENT.

Wednesday, October 3d.

3815. The City of Cincinnati et al. vs. Henry Batche, etc.
 3844. The City of Cincinnati et al. vs. Frank Eicher, etc.
 3845. The City of Cincinnati et al. vs. Larz Anderson, Ex'r.
 3846. The City of Cincinnati et al. vs. Thomas McDonald, etc.
 3847. The City of Cincinnati et al. vs. M. R. Conley et al.

Friday, October 5th.

3894. The City of Kenton, Ohio, et al. vs. The State of Ohio ex rel. C. D. Kelly, etc.
 3883. Cora Cook, Adm'r, etc., vs. The C., H. V. & T. Ry. Co.

Wednesday, October 10th.

3838. Jacob Landis, etc., vs. The Board of Commissioners of Darke county et al.
 3441. The Excelsior Laundry Co. vs. Catherine J. Rigney.

Friday, October 12th.

3120. The B. & O. Ry. Co. vs. Esther Griffith.
 2984. The People's and Drivers' Bank vs. The Treasurer of Fayette county.

Wednesday, October 17th.

3872. The Cincinnati Inclined Plane Ry. Co. vs. The City of Cincinnati.
 3940. Andrew Oberlin et al. vs. Rezin B. Wasson et al.

Friday, October 19th.

3907. The C., C. & I. Ry. Co. vs. Chas. V. Rasey.
 3994. The Citizens' Electric Railway, Light and Power Co. vs. Samuel McMullen.

Wednesday, October 24th.

4042. Joseph Ralston vs. John Wells.
 4053. The Toledo Consolidated Street Railway Co. vs. Thomas Sweeney et al.

Friday, October 26th.

2447. Eleazer G. Gorcy vs. Esther Bailey.
 2454. F. Designore & Bro. vs. The Champion Ice Manufacturing and Coal Storage Co.

Wednesday, October 31st.

2455. Holmes, Booth & Haydens vs. William J. Hays et al.
 2456. The Board of Education of New Concord Village School District vs. Jennie Best.

Friday, November 2d.

2472. Albert Hawkins vs. Alonzo M. Goodrich.
 2480. John L. Kinney et al. vs. Joel W. Kinney et al.

Wednesday, November 14th.

2484. The Ohio Southern Ry. Co. vs. Pavey & Pavey.
 2498. Wm G. Allen, Executor, vs. The Amazon Insurance Co.

Friday, November 16th.

2500. Joseph S. Hull vs. Wm. I. Hull et al.
 2509. Almon Bailey vs. The Northwestern Ohio Natural Gas Co.

Wednesday, November 21st.

2512. Levi Serrick et al. vs. Lucinda Serrick, Executrix.
 2515. Joshua Thomas vs. John W. Fawcett, et al.

Friday, November 24d.

2517. The Village of Oak Harbor vs. Margaret Kallagher.
 2528. Fredericka Borges vs. The City of Cleveland.

Wednesday, November 28th.

2536. The Jackson County Coal Co. et al. vs. Wm. P. Austin, Administrator.
 2843. The Jackson County Coal Co. et al. vs. Wm. P. Austin, Administrator.
 2537. The Jackson County Coal and Iron Co. et al. vs. Wm. P. Austin, Administrator, et al.
 2842. The Jackson County Coal and Iron Co. et al. vs. Wm. P. Austin, Administrator, et al.

Friday, November 30th.

2546. The Mt. Adams and Eden Park Ry. Co. vs. The City of Cincinnati.
 2551. Chas. T. Greve, Trustee, vs. Thomas A. Hardman.

Wednesday, December 5th.

2558. Barbara Pope vs. Michael T. Flynn.
 2559. The Ohio Insurance Co. vs. J. K. Humphrey.

Friday, December 7th.

2566. Jo'm B. Mohn, Administrator, vs. The Village of Clyde.
 2574. The Wheeling & Lake Erie Ry. Co. vs. J. L. Ames et al.

Wednesday, December 12th.

2591. Wm. Fulton vs. Rebecca Fulton.
 2592. The Board of Education of Hubbard Township vs. William Clingan.

Friday, December 14th.

2605. The C., H. V. & T. Ry. Co. et al. vs. Stephenson Burke et al.
 2606. Wm. G. Wilson vs. The Cleveland Leader Printing Co.
 N. B. Court meets for the hearing of Oral Argument at 9:00 a. m. (local time) 8:32 (standard time).

CASES DISMISSED.

The following cases were dismissed for failure to file printed record:

- Alfred Kelly v. E. E. Heskett.
 H. C. Hedges v. L. L. Me ns et al.
 A. L. Johnson et al. v. Daniel Dawson.
 Same vs. same.
 Loretta H. Hougher et al. v. F. E. McGervey, assignee, et al.
 The L. S. & M. S. Railway Company v. Emma Munger.
 Mary A. Palmer, executrix, v. William A. Palmer et al.
 Wallace Burch et al. v. City of Cincinnati et al.
 John T. Trabbs v. Smith & Ozier et al.
 John S. Cox v. Mary A. Rose et al.
 Swisher et al. v. McCann Seymour et al.
 Lot C. Stillwell, assignee, et al. v. Daniel Blayney.
 W. H. Garrett et al. v. Jacob F. Brown.
 Eliver Martin v. the State ex rel. Anna Thompson.
 Jacob Weber v. Henry Mulster et al.
 Same v. Marie Brode et al.
 H. W. Geboner v. Chas. S. Rindfleisch et al.
 The Commercial Insurance et al. v. Thomas Longworth et al.
 D. P. Crowin et al. v. The Potters' Co-operative Company et al.

ADMITTED TO THE BAR.

A class of seventy-five young men, fresh from the arduous research in the field of law, signed the attorney's roll in the clerk's office, Supreme Court, to-day. The following are a list of the successful applicants:

J. H. Arnold, Columbus; S. P. Baldwin, Cleveland; C. W. Bente, Findlay; W. E. Ball, Fredericktown; W. L. Ball, Fredericktown; Allen S. Beach, Mansfield; E. T. Boyd, Marion; Walter F. Brown, Toledo; Edward D. Bush, Washington; Morris L. Black, Cleveland; W. W. Campbell, Gibsonburg; Edward E. Carr, Mansfield; Frank C. Carr, Hillsboro; John W. Conry, Fremont; George Cooke, Martinsburg; Howard A. Couse, Cleveland; T. R. Deselm, Cambridge; John O. Dickerson, Cadiz; Dan'l E. Downs, Jackson; Wm. McKinley Duncan, Cleveland; A. W. Elson, Steubenville; Jas. A. Ford, Norwalk; Wm. E. Forgy, Springfield; Joseph Fox, Cincinnati; Harold W. Fraser, Toledo; Joseph C. Goodman, Columbus; Grant Goshorn, West Salem; Charles T. Grant, Akron; David F. Griffith, Youngstown; Charles F. Hathaway, Marathon; Thomas R. Hamilton, Lima; Lloyd F. Harms, Port Clinton; Joseph P. Hays, Columbus; Mrs. Eason Holbrook, Lebanon; Burton Page Hollister, Cincinnati; W. B. Johnson, Elyria; John J. Lehman, Rising Sun; H. B. Lewis, Washington; C. H. Everett, L. Lyon, New Waterford; W. H. McLellan, Jr., Toledo; L. B. McCord, Cincinnati; Edward B. McFadden, Columbus; John B. McGrew, Springfield; H. H. McKeahan, Cleveland; W. Chester Maple, Lebanon; E. J. Marshall, Toledo; Wm. H. Miller, Dayton; Harry E. Parker, Georgetown; Glenn R. Patton, Washington; Phillip Payne, Dayton; Frank D. Rosebrook, Kenton; U. Grant Rose, Santa Fe; Frederick M. Sackett, Columbus; Herbert G. Schaibly, Cleveland; J. Francis Seiberling, Akron; George C. Sheffler, Rising Sun; Norris J. Shupe, Cleveland; Solon C. Smith, Jackson; Samuel B. Taylor, Toronto; Wallis C. Taylor, Antrem; C. C. Thompson, Killbuck; Dudley C. True, Cleveland; C. R. Tuttle, Painesville; H. H. Tilden, Cleveland; J. Howard Van Derveer, Cleveland; W. T. Vaughan, Akron; Henry DeA. Waite, Toledo; W. E. Weygandt, Orrville; J. G. Whitaker, Chillicothe; Frank E. Whittemore, Akron; H. L. Wilhelm, Ashland; W. W. Woodbury, Jefferson; Harry P. Willey, Zanesville; John W. Zuber, Antwerp; and L. G. Worstell, Athens.

Mrs. Eason Holbrook, the lady who passed successfully, is the wife of President Alfred Holbrook of the National Normal University, Lebanon, Ohio. Two of the young men who passed were graduates of the law department of that school.

ABSTRACTS OF RECENT DECISIONS.

CONTRACT. Damages for Breach. Plaintiff bought stock of a national bank under an agreement with defendant that, at the end of a year, he would take it back, and repay plaintiff the price and interest. Plaintiff gave notice, and, at the end of the year tendered the stock. Between the notice and the tender the bank

became insolvent. After the tender the Comptroller of Currency levied an assessment upon the stock which plaintiff had to pay. It was held, in an action for breach of contract, that plaintiff could recover, not only the purchase price and interest, but also the amount of the assessment. *JAY V. DARE*, Cal., 37 Pac. R. 466.

In deciding the case, the court used the following language in defining the rights of a vendor in a suit against a vendee for refusal to comply with a contract for the purchase of personal property:

"The vendor of personal property, in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three methods to indemnify himself: (1) He may store or retain the property for the vendee, and sue him for the entire purchase price (2) He may sell the property, acting as the agent for this purpose of the vendee and recover the difference between the contract price and the price obtained on such resale. (3) He may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price." (*Duston v. McAndrew*, 44 N. Y., 72; *Dwiggins v. Clark*, 94 Ind., 49; *Sedg. Dam.*, 8th ed., sec. 753.) The plaintiff here adopted the first of the methods above set forth, and retained the property for the vendees until suit was brought, when he deposited it in Court for their benefit. This he had a right to do. Indeed, in all that class of cases where a purchaser of chattels pays the price, but stipulates that, after a trial of the property purchased, or at some future time, he may, if he so desires, return the property, and receive back the price paid, it is usually held that it does not amount in law to a contract to repurchase, but is, upon the exercise of the option, a rescission of the contract, and the title at once vests in the original vendor (*Laubach v. Laubach*, 73 Pa. St., 387; *Thorndike v. Locke*, 98 Mass., 340.). Be this as it may, it was the duty of the defendants on the 20th day of January, 1892, to receive the stock and repay plaintiff his money, with interest, which they refused to do. One of the results of such refusal was that plaintiff was compelled to pay an assessment of \$10,000, subsequently levied upon the stock. Upon a tender by plaintiff and refusal to accept and pay by the defendants, the former held the stock as the trustee for defendants; and, as such trustee, he was entitled to all necessary expenses for which he became liable and paid by virtue of his position."

Ohio Legal News.

(Formerly Toledo Legal News.)

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A. L. SLEEPER, EDITOR.

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OUT OF PRINT.

The Ohio Local and Special Laws, passed by the General Assembly in 1893, were issued in but a small edition by the State, and no copies were distributed to members of the bar. Being state printers, fortunately for the lawyers, we saved the plates, and have issued an edition as a personal venture. No library is complete without a copy. Three dollars gets one of these Laws and the OHIO LEGAL NEWS for one year. The edition will soon be exhausted. Subscribe now.

THE OHIO LEGAL NEWS occupies a field in legal journalism heretofore vacant or illy filled. Its purpose is to render accessible to the bar of Ohio, the leading decisions of the courts of the state, and those of courts in other states bearing upon questions of importance in Ohio practice. Attempts in this line have been made by others, and are being continued, but only a small portion of the field has been covered. Ohio is a large state, with elaborate and diversified interests, out of which grow many interesting contentions, and from the great number of courts proceed many important decisions. Scarcely a case involving a question of law is decided that is not valuable either as a precedent, or to assist the attorney in the preparation of a suitable argument to sustain a similar position.

In the past, but a small comparative number of decided cases have been published, because of the lack of enterprise shown in the only Ohio existing law paper, in the absence of stimulating competition. On rare occasions, when the Judges were willing to write out and furnish gratuitously a decision, it has reached the bar, through the grace of the proprietor of that sheet, who still insists that he shall occupy the field exclusively, as in the past, and to the detriment of all progress along this line of effort.

Important cases from every county and circuit have been constantly lost to the profession, because with the burdens of increasing dockets, the preparation of written opinions by the Judges has become impossible, and has not been done except in rare instances where the Court has felt an unusual interest in the points involved. THE OHIO LEGAL NEWS will be devoted to the publication of as many as possible of what heretofore have been unreported, and thus become lost decisions. By the aid of the stenographer, the oral opinions will be transformed into written ones, which, when revised by the Court announcing them, will be published and made accessible to the bar. Patrons of the old journal have been made to believe they were receiving all of the important cases, but they can easily see the mistake when they know the *modus operandi* pursued in getting cases for that paper.

Our contemporary manifests much alarm, lest in our efforts we may duplicate some of the work he is doing. There is no cause for this. We shall not be behind, and the only duplication probable will be instances where

the cases we publish are copied, or the features we present are repeated, by our rival, because he has been too slow to have them out on time. We shall furnish exclusive new matter enough, such as he has not heretofore attempted to get, and which he can now get only from our pages, which will be closed by copyright if necessary to prevent intrusion, to repay all our subscribers for their investment.

One journal of the kind published in the past is undoubtedly enough in Ohio, but we believe there is a demand for a live legal paper, and we are going to ascertain whether there is or not, by offering one to the profession, and allowing them to discriminate.

We are attacking no publication, and if allowed to publish our paper unmolested, will engage in no controversy with our competitors. The above is published simply to explain wherein we think the legal profession are to be benefited by the advent of the OHIO LEGAL NEWS, a point over which brother Jahn seems considerably exercised.

"The publishers of the *Legal News* having as we are informed, sent letters to the courts all over the state, requesting reports of their decisions, the circuit courts of several circuits have already informed us that they have concluded to have nothing to do with them; and what is still worse, we have received letters from Judges of different parts of the state complaining of the way in which alleged decisions of theirs have been published in the *Legal News*."

The above is a part of the whine put up by the proprietor of the *Law Bulletin*, because of his alarm at the strength displayed by this publication, and the favor with which it has been received. It is absolutely untrue in every particular. No letter of the kind has ever been sent from this office, and we insist that no such letter from a Judge has ever been received, because no cause for a complaint has ever arisen. If such a letter was ever sent to the *Bulletin* it was a criticism of some of the mistakes so frequently found in it. On a par with the above libel, is its attempt to fitch an endorsement from the late Hon. J. W. Tyler, of Cleveland, by a statement that the publisher would not dare to make if the alleged author were alive to refute it. This paper is on the best terms with the Judges of Ohio, and no effort which any mischief maker may make to further his own interests, can raise any estrangement between them and us.

Several decisions appear in this number, taken exclusively for the OHIO LEGAL NEWS, by our own stenographer and which would never have been published if we had not taken this pains. The number of such cases will be such that our paper will be a necessity to every lawyer who wishes to have Ohio decisions complete.

The *Law Bulletin* says: "The LEGAL NEWS will probably have the advantage over us, in being able to get hold of some valuable decisions of the courts in its own and adjacent counties." This is about the only truth told in the article concerning us, found in its issue of last week. And we shall get them from other more remote counties, and they will be our exclusive property.

We call attention to the decision of Judge Taft in the case of the *Western Union Telegraph Co. v. Poe*, found on page 565 of this issue of the OHIO LEGAL NEWS. This case pronounces the Nichols law unconstitutional, and is an important one in Ohio. It was decided April 23, 1894, but notwithstanding the long lapse of time, it has not heretofore been laid before members of the Ohio bar, generally, because the existing organ of the profession has not, as yet, published it. Competition drove it into publishing the long opinion by Justice Harlan in the Strike case, last week, and we expect to see it duplicating our work by publishing the Nichols law case, after a while.

Several important mandamus cases are pending before the Supreme Court. One from Darke County attempts to annul an act of the last General Assembly, changing the subdivisions of the second judicial district. Another seeks to compel the election supervisors in Jackson County to place on the official ballot the names of candidates not filed within the prescribed fifteen days before election, as required by section nine of the ballot laws. The lower courts have held the section to be directory and not mandatory. Litigation resulting from the vigorous prosecution of cases recently carried on by Dairy and Food Commissioners McNeal will soon reach the Supreme Court, in which the validity of some of the pure food laws, is to be tested.

Attorneys will find it to their interest to examine the new law relating to partnerships, § O. L. 357, persons doing business as partners who do not comply with the provisions of the act as to filing and publishing a certificate stating the names of all the members of the partnership and their residence, cannot maintain an action on account of contracts made or transactions had in the partnership name. Attorneys who are not familiar with this law may some time find themselves unceremoniously out of court.

Communicated.

RES GESTAE.

The Admissibility of Declarations of Parties to Transactions as Part of Res Gestae.

By WILL J. ORY, A. B., LL. B., of the Canton, Ohio, bar.

Res gestae, as a term in the law of evidence, is of comparatively modern origin. The term, it is true, is found in the Code and Digests of Justinian, but in that connection it appears in the form *res gesta*, and is used in the untechnical sense of an occurrence or transaction. We first meet with it in the English law in the year 1794, in Hooke's trial, reported in Howell's State Trials, 440. The term is again used in 1801 in the case of Hoar v. Allen, 8 Esp. 276. We do not find the term in any text book either on the subject of evidence or any other, prior to the present century, but in 1806 the expression *res gestae* appeared in Evans' Appendix to Pothier on Obligations. The expression, as a technical term of evidence, originated in England and the first instance we have of its use on this side of the Atlantic is in the case of Bartlett v. Delprat, 4 Mass. 702, reported in 1808, in which case the term was used by Mr., afterward Mr. Justice Story, in his argument.

It is not to be understood, however, that the legal doctrine involved in the *res gestae* rule was not recognized before the introduction of the term itself. This doctrine, like all well established legal principles, is a growth—an evolution from precedent principles—which was developed in its present form only by gradual formation in the course of time, and which, judging from the present conflicting decisions, is destined to undergo still further modifications before it shall finally reach that stage of perfection that it will enable courts to apply the rule with any great degree of precision. Hence it is that the doctrine had obtained a recognized place in the law before the phrase which we now use to designate it was applied so distinguish the rule itself.

We are unable, therefore, to determine the precise period when the doctrine of *res gestae* made its appearance in the science of jurisprudence. We do know, however, that the doctrine is comparatively modern, for the reason that the rule excluding hearsay, which necessarily precedes that concerning *res gestae*, was not recognized as a rule of evidence much before the reign of Charles II, and that even as late as 1790 there was considerable controversy as to the limits of the hearsay rule.

But whatever may be the origin of the doctrine of *res gestae*, and however modern may be the term itself, it is to-day one of the most familiar terms of the law. It occupied a conspicuous place in all late works on the subject of evidence, and the reports issued during the last half century are replete with cases in which the rule has been discussed and applied. The study of the doctrine is of absorbing interest to the student of law, not only because of the importance of the subject, but also because of the uncertainty which at present characterizes

the understanding and application of the rule. It is our purpose, in the following pages, to enter upon a discussion, necessarily brief and imperfect, concerning the meaning of the term *res gestae* and the nature and limitations of the rule admitting declarations as part of the *res gestae*, and to this end we will consider first, the origin of the rule in the law of evidence; secondly, the meaning and extent of the term itself; and lastly, the application and limitations of the rule admitting declarations as *res gestae*.

I. ORIGIN OF THE RULE OF EVIDENCE.

One of the fundamental rules of the Law of Evidence requires that the best evidence of which the case, in its nature, is susceptible, must always be produced. As a corollary to this general and exclusive proposition, the law upon this subject presents another rule, which lays it down as a general doctrine, that that class of testimony known in the law as hearsay shall not be receivable in evidence. Speaking generally, we may say that hearsay includes all such evidence as depends for its value not upon the credit due to the witness himself, but also, in part, upon the competency and truthfulness of another.

The reasons for this rule are stated at length by all the writers on Evidence, and have their origin in those fundamental principles which underlie not only the Law of Evidence as a branch of jurisprudence, but also the concepts of natural justice. To abrogate or disregard the rule excluding hearsay would be to ignore the requirement that all witnesses must be placed upon their oath and subjected to cross examination in order that their credibility may be thoroughly tested and their veracity established. Add to this objection the intrinsic weakness of such evidence, its tendency to protract litigation, the opportunity it affords for fraud, and its inherent insufficiency to satisfy the ordinary mind, and the wisdom and equity of the hearsay rule will be at once apparent. In the language of Buller, Jr., "If the first speech was without oath, another oath that there was such a speech, makes it no more than a bare speaking, and so of no value in a court of justice." (a)

A rigid adherence to the proper rules of evidence is essential to the faithful and uniform administration of justice. As has been well observed by Mr. Justice Clifford, (b) "Life, liberty and property depend largely on the strict observance of the rules of Evidence, and experience has demonstrated that wrong verdicts are the usual result of the wrong admission of improper testimony or the improper exclusion of testimony that is competent and material. It is evident, therefore, that the rule forbidding the admission of hearsay should not be departed from except in cases which manifestly fall within the exceptions to the hearsay rule.

These exceptions it is not necessary for us to state in this connection. We have dwelt upon the rules requiring the best evidence and excluding hearsay, not because the rule admitting

(a) Buller's Nisi Prius, 291.

(b) Ins. Co. v. Mosley, 8 Wall. 397.

declarations that are part of the *res gestae* is an exception to either, but in order that it may be apparent that it falls within the meaning of the first and consequently does not violate the second. In other words, as we hope to demonstrate later on, declarations that are part of the *res gestae* are the best evidence in the cases in which they are admitted, and do not fall within the rule excluding hearsay, because they are not properly hearsay, but, on the contrary, verbal acts—"declarations which are the tongues of acts."

Having thus gone to the origin of the *res gestae* rule in the Law of Evidence and having stated that it is strictly a part of and not an exception to the rule requiring the best evidence, we shall not proceed to define the term *res gestae*, and to illustrate the rule admitting declaration that are a part of it, in order that we may ascertain whether or not our foregoing premises are correct.

II. MEANING AND EXTENT OF THE TERM.

The term *res gestae*, in its broadest acceptation, includes all things done, words spoken and exclamations uttered in the course of a transaction. Mr. Wharton, in his able work, defines the *res gestae* as "those circumstances which are the automatic and undesigned incidents of a particular litigated act, which are admissible when illustrative of such an act" (c). Mr. Roscoe says: "When hearsay is introduced, not as a medium of proof in order to establish a distinct fact, but as being in itself a part of the transaction in question, it is then admissible; for to exclude it might be to exclude the only evidence of which the nature of the case is capable" (d). In other words, the so-called hearsay in this case ceases to be hearsay, according to the definition of hearsay given above, and becomes, in effect, a constituent of the act itself. In the elegant language of Prof. Greenleaf (e) "the affairs of men consist of a complication of circumstances so intimately interwoven as to be hardly separable from each other. Each owes its birth to some preceding circumstances, and, in its turn, becomes the prolific parent of others; and each, during its existence, has its inseparable attributes and its kindred facts, materially affecting its character and essential to be known in order to a right understanding of its nature."

It would be useless to incumber an essay of this kind with more definitions of the term *res gestae*. In every work on the subject of Evidence, an attempt is made to bring within the limits of a concise definition the essential characteristics of the term, but the above examples sufficiently illustrate the nature of these definitions, as well as indicate the meaning of the term itself. It may be well, however, to notice a recent criticism of all definitions of the class exemplified above, which appeared in an article by Mr. Alfred Jenkins Shriver of the Baltimore Bar, in the Baltimore Daily Record of October 25, 1893. Mr. Shriver contends that it is neither rea-

sonable nor necessary to bring acts into the definition of *res gestae*, for the reason, as he states it, that if an act is relevant to any question in dispute, it is competent, irrespective of any *res gestae* rule, but if irrelevant, there is no principle in the doctrine of *res gestae* that can make it competent or admissible. He then proceeds to define *res gestae* as "the verbal incidents of an act, admitted as a part of, and for the purpose of explaining it."

We notice this definition principally because it will tend to further illustrate the *res gestae* doctrine. It will not be necessary, in this connection, to further consider the soundness or importance of Mr. Shriver's criticism, for the reason that as this essay is only to apply to declarations which are admissible in evidence as part of the *res gestae*, any consideration of acts, except as connected with the declarations themselves, would be foreign to our present purpose.

The elegance and substantial agreement of the definitions given above might lead a beginner in the Law of Evidence to the conclusion that the doctrine of *res gestae* is well settled and of easy and uniform application. But unfortunately the writers who so concisely define the term *res gestae*, are much less definite and consistent, although possibly not less elegant, when they come to indicate the limitations and application of the rule so concisely and plainly couched. And ever more unfortunately, the courts in their application of the principles, although in most cases fairly consistent in their individual decisions, are sadly discordant when we begin to compare the decisions of one court with those of another. Indeed, the majority of the text writers, after they have stated the doctrine of *res gestae* with befitting clearness, in attempting to illustrate the doctrine and to apply it to cases that arise, after stating the circumstances in question, conclude with the statement that "these are admitted, provided they form part of the *res gestae*," thus in effect begging the very question they are endeavoring to answer. The courts, although faithful and painstaking in applying the doctrine to the cases that they are called upon to decide, usually confine themselves to the decision of particular cases, and it is not easy to find numerous decisions in which attempts are made to state the general nature and limitations of the *res gestae* rule. After examining a number of cases in which this rule is considered and applied, one can hardly hesitate in accepting the statement of Mr. Stephen, that the term *res gestae* seems to have come into use on account of its convenient obscurity (f). Indeed, Mr. Taylor has said that the doctrine of *res gestae* should be left unfettered by useless definition, and be determined in each case in the exercise of a sound discretion (g).

(f) Stephen's Dig. Ev. Note V.

(g) Taylor's 2d letter to Lord Cockburn.

(c) 1 Wharton on Evidence, Sec. 259.

(d) Roscoe on Evidence, 21.

(e) 1 Greenleaf on Evidence, Sec. 108.

[CONCLUDED NEXT WEEK.]

THE NICHOLS LAW.

WESTERN UNION TELEGRAPH CO. v. POR,
Auditor of State of Ohio, et al.

[Circuit Court, S. D. Ohio, E. D. April 23, 1894.]

1. TAXATION—MARKET VALUE OF CORPORATE STOCK.

A tax upon the property of a telegraph company ("Nichols Law," Rev. St. Ohio, § 2778a), determined, in part at least, by the aggregate value of the shares of its capital stock, conflicts with a constitutional provision (Const. Ohio, art. 12, § 2) that the taxation of all taxable property shall be "by a uniform rule," because the market value of such stock bears no necessary relation or proportion to the value of the tangible property of the corporation, and because it involves elements of value, such as the good will and earning capacity of the business, which are not taxable in the state, and not used therein to determine the value of the taxable property of individuals or other corporations.

2. SAME—FRANCHISE OF CORPORATION.

Such tax cannot be supported as a tax upon the franchise of the corporation to do business in the state, or as a tax upon the business of the corporation, or as a tax upon the property of the corporation, combined with such franchise and business, because the legislature has not prescribed any definite mode of ascertaining the amount of such tax, and could not, under the constitution, commit the determination of such amount to the discretion of a board of appraisers.

3. INJUNCTION—ILLEGAL TAX.

A federal court has no general equitable jurisdiction in such case to enjoin a board of appraisers from certifying the amount to be assessed in each county upon the ground that such tax is illegal, nor does it acquire such jurisdiction under the provision of a state statute (Rev. St. Ohio, §§ 5848, 5849) that an action may be brought to prevent the illegal levy of a tax against a corporation or person beneficially interested in the proceeds, and against a county auditor who completes the levy by placing it on the tax duplicate.

4. SAME—MULTIPLICITY OF SUITS.

In such case, however, a federal court has jurisdiction to enjoin the board in order to prevent a multiplicity of suits in the several counties of the state.

5. SAME—AMOUNT IN CONTROVERSY.

The jurisdiction of the federal court will not be defeated in such case by the fact that the assessment will not amount to \$2,000 in any single county, because, the action being against the board of appraisers, the whole amount to be certified is the amount in controversy.

This is a Suit in Equity to enjoin the assessment of a tax brought by the Western Union Telegraph Company, a corporation and citizen of New York, against the state auditor, attorney gen-

eral, and state treasurer of Ohio. It now comes on for hearing on demurrer to the bill, and on a motion by complainant for preliminary injunction.

The main questions at issue are of the validity, under the federal and Ohio constitutions, of a law of Ohio known as the "Nichols Law," imposing taxes on telegraph, telephone, and express companies. The bill avers that the complainant owns and operates lines of telegraph in nearly all of the states of the Union, including Ohio, said lines consisting of poles with cross arms, supporting suitable wires, for the transmission of telegraphic messages by means of electricity, and employs thousands of men as officers and operators, clerks and messengers, together with line repairers and others. That on April 27, 1893, the legislature of Ohio passed a law for the taxation of telegraph, telephone and express companies, which made defendants a board of tax appraisers for such companies, and directed them to value and assess the property of such companies as follows:

"Sec 2778a. Every express, telegraph and telephone company embraced in section 2777, whether chartered by the laws of this state, or any other state or county, doing business in this state, shall, annually, between the first and tenth days of May, return to the auditor of state, under the oath of its treasurer, the amount of its capital stock, its place of business, the par value and market value (or if there be no market value, then the actual value) of its shares at the time of said return. The return shall also contain a statement in detail of the entire real and personal property of said companies and where located and the value thereof as assessed for taxation; and telegraph and telephone companies shall, in addition thereto, return the whole length of their lines and the length of so much of their lines as is without and is within the state of Ohio, which lines shall include what said telegraph and telephone companies control and use, under lease or otherwise; and said board of appraisers and assessors shall in determining the value of the property of said companies in this state, to be taxed within the state and assessed as herein provided, be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the state of Ohio in the proportion which the same bears to the entire property of said corporation, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid. Express companies shall in making said return, include therein as a part thereof, a statement of their entire gross receipts for the year ending the first day of May of the business done within the state of Ohio; giving the receipts of each office in said state and the location thereof for said year."

The bill further avers that complainant made a statement to the auditor, a copy of which is filed with the bill, showing the

amount of its capital stock and the market value thereof, so far as said market value could be shown, together with a statement of the location and value of its property in the state of Ohio, the number of miles of its telegraph lines in Ohio, and the total length of its lines everywhere. That, acting upon the information thus furnished, and under the requirements of the statute, and not in the exercise of their individual judgment of the valuation of the property of complainant, defendants made an appraisement and assessment against complainant of \$2,011,000, wrongfully pretending that the sum is named as the value of complainant's property in Ohio. That, unless restrained by this court, the defendants, as such board, will certify this assessment, in accordance with the act, to the auditors of eighty-seven counties in the state, wherein complainant's lines run, in the proportion of the mileage of lines in each county, to the state mileage. That said auditors will, on receipt thereof, certify the same to the respective county treasurers for collection. That the rate of taxation in Ohio for the year 1893 varies, according to the county, from two and one-half to three per cent., so that the aggregate assessment against complainant upon said illegal and excessive valuation will amount to between \$50,000 and \$60,000, and in several counties of the state not only the assessment, but the difference between the assessment under said law and an assessment upon a true and lawful valuation of complainant's property will exceed \$2,000. That in truth the entire value of complainant's property in Ohio at all times in the year 1893 prior to and subsequent to May 1, 1893, does not exceed \$647,000, and, estimated as all other property is for taxation in the state, would fall far below that sum. That complainant is the owner of lines of Atlantic cable extending to Cuba and England, and connecting in England with lines of other companies extending to all parts of Europe, and also of lines in Canada. That the total mileage of its lines is 189,576 miles, including the mileage in Ohio, which is 8,272 miles. That the cash value of complainant's property cannot be ascertained approximately by applying the proportion which its lines in Ohio bear to the whole number of miles of its lines, upon a valuation of all the shares of its capital stock, because such a valuation includes elements of value not existing in Ohio, and not taxable within said state, and some of which are not taxable at all; and also because the lines are not of uniform value per mile, either as to gross or net income earned upon the various lines or as to cost of construction and maintenance. That included in the total mileage are thousands of miles of ocean cable, costing \$4,000 per mile, while the lines per mile in Ohio cost but \$103.60 per mile. That the income per mile in many states is much greater than in Ohio, and that the average income per mile in the entire system is much greater than that of the lines in Ohio. That the market price of complainant's stock affords no fair or reasonable or just method of forming an opinion as to the value of its prop-

erty or of fixing a basis of value for the taxation thereof, because it is speculative and variable, dependent on conditions having no relation to complainant's business or property. That the actual value of complainant's shares is made up of property of various kinds in various states, of valuable contracts with railroad companies and other companies and individuals, of franchises conferred by act of congress of July 24, 1866 (14 Stat. 221), of franchises granted by other states and municipalities in them and by foreign governments, of business experience, good will, and skill employed in the prosecution of its business, of investments in bonds and stocks of other corporations aggregating \$7,633,230.12, and real estate out of Ohio worth more than \$5,000,000. That the tax proposed to be levied under the assessment sought to be enjoined would amount to 30 per centum of its earnings in Ohio from all its business in Ohio, including interstate commerce,—an unheard of rate of taxation, and substantially destructive of its business in said state. That the complainant's property in Ohio is of the simplest character, consisting only of poles, wires, office furniture and instruments used in telegraphy. The bill avers that the law is void, because it does not require the valuation of the property of complainant and other companies according to its true value in money, as the property of all other corporations and individuals is valued for taxation and as all property is required to be valued for taxation under the state constitution in Ohio but directs a valuation according to the opinion of the board of appraisers as to the value of the capital stock of such companies, which is determined by the diligence, fidelity, and skill with which the business of said companies is conducted, by its good will, and by the property of said companies in many states and by the general financial conditions existing in the country. "To the end, therefore, that the complainant may not be subjected to a multiplicity of suits which would otherwise be brought against it for the recovery of assessments, to wit, suits in eighty-seven counties in which it does business in Ohio, a provisional injunction restraining defendants from certifying the said assessment to the various county auditors in which complainant does business, and, after final hearing, a perpetual injunction are prayed for.

Upon the filing of the bill, Judge Sargent granted a temporary restraining order until motion for a preliminary injunction could be made, heard, and disposed of. Defendants thereafter interposed a general demurrer to the bill. The motion and the demurrer came on for hearing. The court decided that the bill was defective, in that it admitted certain facts to be due, without any averment that they had been paid; but allowed complainant a week in which to pay them, and to file an amendment showing such payment. The amendment was filed. A reargument was ordered on the merits. The minutes of the board, which accompanied the affidavit, showed its findings and suggestion with reference to complainant as follows: "That on the 1st day of May, 1893, the amount of the capital stock of said corporation, issued

and outstanding, was \$94,000,820. The par value of its shares was \$100 each, and the market value of its shares on said day was \$87 each. That the value of the entire capital stock of the company on said day was 94,008½ shares at \$87 a share, or \$81,780,713.40. That there should be deducted from the value of the capital stock so found (\$81,780,713.40) the value of the investments of the company in bonds and stocks of other corporations, being \$7,633,230.12, and the value of the real estate owned by it outside of Ohio, being \$5,013,326.14; making altogether \$13,646,556.76; leaving \$69,134,156.34, being the value of the entire capital stock of the company as based upon and represented by the lines of the company. That the whole length in miles of said company, both within and without the state of Ohio, was on the said day 189,576 miles, and the length of such lines in the state of Ohio was 8,272 miles. That the proportion of the entire value of the capital stock of said company employed in business in Ohio and represented by property taxable therein was on said 1st of May, 1893, 8,272-189,576 of \$69,134,156.34, which equals \$3,016,614.67. On consideration of the foregoing, the fact that property generally in Ohio is taxed at not more than two-thirds of its actual value, the statement in the return of the company that to reproduce the lines in this state will cost the sum of \$1,049,279.10 (which the board regards as an insufficient estimate, and, at any rate, much below the existing value of said lines as an entirety), and other facts and evidence contained in the return of the company and otherwise brought to the attention of the board, on motion the board unanimously fix and determine the value of the property of the Western Union Telegraph Company in the state of Ohio to be assessed and taxed therein at the sum of \$2,011,076.45." An affidavit of the state auditor was filed, showing that in no one county in the state would the tax to be collected from the Western Union under this assessment equal \$2,000, and that the difference between the tax assessed and the tax admitted to be due was much less than that sum.

Brown & Wells and Ramsey, Maxwell & Ramsey, for complainant.

J. K. Richards, Atty. Gen., and Thos. McDougall, for respondents.

Taft, Circuit Judge, after stating the case as above, delivered the opinion of the Court.

The first question for consideration is whether this court has any jurisdiction, as a federal court in equity, to grant the relief prayed in the bill. Section 5848 of the Revised Statutes of Ohio provides that suits may be brought to enjoin the illegal levy and collection of taxes and assessments. Section 5849 provides that actions to enjoin the illegal levy of taxes and assessments must

be brought against the corporation and person for whose use or benefit the levy is made, and, if the levy would go on the tax duplicate of the county, the county auditor must be enjoined. These actions give the right to relief by injunction on the sole ground that the tax is illegal, enlarging in this respect the ordinary equitable jurisdiction to enjoin the levy or collection of taxes. The remedy thus afforded will be enforced in federal courts of equity (*Cummings v. Bank*, 101 U. S. 153), but, of course, its extent is limited by the statute which gives it existence. Now, it is obvious from section 5849 that the only persons against whom such an action can be brought to prevent the levy of a tax are the corporation or person beneficially interested in the proceeds of the tax and the auditor who takes the final steps in completing the levy by placing it on the duplicate. *Jones v. Davis*, 35 Ohio St. 474. These bills are not filed against either the corporations for whose use the tax will be collected or against the county auditors. The bill cannot be sustained, therefore, as invoking the special remedy afforded by the sections of the Ohio statutes above quoted.

Can they be sustained on the general equitable jurisdiction of the court? It is well settled that the mere illegality of a tax is no ground for invoking equitable relief. *Shelton v. Platt*, 139 U. S. 591, 599, 11 Sup. Ct. 646. But we find, set up in the bills, a ground upon which courts of equity frequently grant relief, and that is, to avoid a multiplicity of suits. If the amounts assessed by the board are certified to the various county auditors, the complainant will be compelled to bring a suit, either to prevent collection of these taxes or to recover them back after paying them, in each one of 87 counties. This will be the most oppressive, and would certainly seem to furnish ground for equitable interference by this court, unless other objections advanced by counsel for defendant, and now to be considered, must prevail.

It is first said that the injunction sought is premature, because against the valuers, and not against the collecting officers. If such a suit can be brought, then it is argued that a bill will lie to en-

join the legislature from passing the bill. This is a non sequitur, instead of a reductio and absurdum. What is here sought to be enjoined is the certificate by the board of appraisers to the county auditors of the amounts to be assessed against plaintiff. The auditors are then, by law, required to place the same upon the tax duplicate, and deliver the duplicates to the county treasurers as warrants for the collection of the taxes. The duties of the county auditors and treasurers in this matter are wholly ministerial. The law reposes in them, no discretion whatever, to reduce or modify the assessment. It is said that the state auditor has power to correct all injustice in assessments for taxation, and constitutes a tribunal of review for the purpose. I cannot agree with this contention. It is true that, generally speaking, the state auditor is at the head of the taxing department of the state. By section 166 of the Ohio Revised Statutes he is required to instruct the auditors of the several counties in the state; and by section 167, which is the section chiefly relied on, his power is thus defined:

"He may remit such taxes and penalties thereon as he ascertains to have been illegally assessed, and such penalties as have accrued or may accrue in consequence of the negligence or error of any officer required to do any duty relating to the assessment of property for taxation or in the duplicate of taxes in any county; provided, that when the amount to be remitted in any one case shall exceed one hundred dollars, he shall proceed to the office of the governor and take to his assistance the governor and attorney general and in all such cases may remit no more than shall be agreed upon by a majority of the officers named."

I think this section does not confer any power on the state auditor, the governor, the attorney general, to correct assessments under the Nichols law, which provides such special machinery for assessments as to prevent its application; otherwise the taxing system of Ohio would present the absurdity of subjecting the quasi judicial action of a board consisting of the state auditor and two others to the review of the state auditor alone in every case where the assessment does not exceed \$100, and in cases involving more than \$100 would make a majority of the reviewing court to consist of the majority of the court of first instance. The action of the board of appraisers in

certifying the assessments to the county auditors is, therefore, a finality.

It is suggested that there is the possibility that the county auditor and county treasurer may refuse to comply with the duty imposed by an unconstitutional law. Certainly these county officers are not tribunals established to consider constitutional questions, before whom complainants could be heard. The presumption is that they will obey a law which was in due form passed by the legislature, and will assume its validity, especially when it has been treated as valid by the head of the taxing department and the head of the law department of the state. The possibility suggested is too remote, to prevent a court of equity from properly treating the certificate of the board of appraisers, as a final step, directly to the prejudice of the complainants, with no taxing tribunal or authority to whom it can appeal in the procedure provided by the law, before the tax is to be collected. The supreme court of Ohio in *Jones v. Davis*, 35 Ohio St. 474, did not hold that a proceeding to enjoin a board of equalization from certifying an assessment to the county auditor was premature. They only held that a proceeding to enjoin the auditor before he had added the assessment to the duplicate was not too late, because, until that time, he had not completed his levy, which section 5849 of the Ohio Revised Statutes gives the taxpayer, a special remedy against him to enjoin. Of course, the complainant here, under section 5849, might bring actions to enjoin the county auditor or county treasurer of each county from levying or collecting these assessments, but then the multiplicity of suits would be an accomplished fact, and the basis for general equity jurisdiction in the matter would have disappeared. It is said that the equity jurisdiction to prevent a multiplicity of suits is never exercised except against those who are about to bring the suits. No case is cited which makes this distinction, and I do not see any good reason for it.

Again, it is urged that the affidavits filed show conclusively that in no single county will the assessment against the complainant amount to \$2,000; wherefore the argument is that the jurisdiction of this court cannot be supported by ad-

ing together the amount due in each county. If my conclusion is correct, that this action will lie against the board of appraisers, there is nothing whatever in this objection, because the amount involved in controversy in the suit is the whole amount to be certified by the board under the law, less the aggregate amount which the complainant must pay in the various counties of Ohio, under such laws as are in force if the Nichols law is not valid. That difference admittedly exceeds \$2,000. For this reason, I am of the opinion that the bill does present a case for equitable relief in a federal court.

Another reason advanced by counsel for defendants, why the relief prayed for should be denied, is that the complainant has only tendered or paid to the various county treasurers the amounts due on the valuation of their real and personal property as it claims it to be, according to the local rates of taxation, but has not tendered or paid the amount due on its gross receipts for business within the state of Ohio, as provided by the law, which the Nichols law was passed to supplant, and which is in force, if the Nichols law is invalid. This objection I shall defer considering until later.

The Nichols law purports to tax only the real and personal property owned by telegraph, telephone and express companies in Ohio. The gist of the act is contained in the following sentence, found in the latter part of section 2778a:

"And said board of appraisers and assessors shall in determining the value of the property of said companies in this state, to be taxed within the state and assessed as herein provided, be guided by the value of said property as determined by the value of the entire capital stock of said companies and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies in the state of Ohio, in the proportion which the same bears to the entire property of said corporation as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid."

The validity of the foregoing method of valuation, so far as complainant is concerned, depends on the correctness of two propositions. The first is that the telegraph plant in one state has an added money and taxable value as a plant in

that state, because it is physically a part of a great system or ~~machine~~ covering the country. This is substantially the same principle as that involved in the taxation of interstate railroads in Ohio, which has met the approval of the state supreme court (*Insurance Co. v. Ratterman*, 46 Ohio St. 153, 166, 19 N. E. 560), and its soundness may therefore be conceded. See, also, *State Railroad Tax Cases*, 92 U. S. 575.

The second proposition is that the market value of the aggregate shares of the capital stock of telegraph, telephone and express companies is a proper guide in fixing the true value in money of their real and personal property in Ohio in constitutional uniformity with the mode of assessing the real and personal property of individuals and other corporations. The language of the legislature is by no means clear in defining the method of valuation, but this much is certain: that the board are enjoined, unless exceptional circumstances require otherwise, to consider the value of all the shares of the capital stock as a basis or controlling element in estimating the value of the real and personal property of the corporation. The capital stock is the only element of value specifically mentioned, and that occurs twice in the same involved sentence. Other evidence and rules are referred to, but they are left to the board to select or adopt. The one thing which the board is required to consider in each case is the value of the capital stock. It is true that the board may exercise a discretion in their appraisal to give more or less evidential weight to the value of the capital stock. But here is the legislative declaration that in every case such value must be considered, and the necessary implication is that it is an important element. The object of this clause was to increase the valuation of the property of corporations above that which it would have, without reference to the capital stock. The two laws which the Nichols law supplanted in the taxation of foreign telegraph and express companies imposed a tax upon all the real and personal property owned by those corporations in Ohio, and also a tax, decided to be a franchise tax, measured by a percentage of the gross receipts from business done

within Ohio. Rev. St. Ohio (Smith & Ben.) §§ 2744, 2778; *Telegraph Co. v. Mayer*, 28 Ohio St. 521; *Ratterman v. Telegraph Co.*, 127 U. S. 411, 8 Sup. Ct. 1127. Now we may take judicial notice of the commendable efforts of the legislature of Ohio, in view of the condition of the state treasury for a number of years past, to increase the taxable sources of revenue, and we may reasonably infer that it was not the legislative intent to reduce the tax upon telegraph companies or any other foreign or domestic corporation. When, therefore, for a tax upon all the personal and real property of such companies, assessed without reference to the value of the capital stock, and a franchise tax as well, there is substituted a tax upon the property of the corporation in Ohio on a valuation to be determined, in part at least, by the aggregate value of the shares of its capital stock, we must necessarily infer that this basis of valuation is expected to add substantially to the valuation of the same property when made without reference to such a standard. Convincing evidence is found that this construction of the law is sound in the result of the valuations under the new law as compared with those under the old, and the course taken by the board in every case which has come to the notice of the court. In each, the board began with the market value of the capital stock, and made its deductions from that to reach the value of the property. The intrinsic or cost value of the property seems to have been lightly regarded as compared with the market value of the capital stock. Now, it is true that what the appraisers have done does not necessarily determine the meaning of the law but it is persuasive of the intent of the legislature. We are led, by this construction of the Nichols law, to consider what necessary relation, if any, there is between the market value of the capital stock of the companies embraced within its terms and the true value in money of their property as it may be assessed for taxation in Ohio. A share of stock entitles its owner to a proportionate share in the net earnings of the corporation, and, upon dissolution, to a proportionate share in the assets of the corporation after the debts are paid. Its value in a cor-

poration whose corporate life is not limited by its charter depends almost wholly on the net earnings of the corporation or on its prospective capacity for producing them. The aggregate market value of the stock of any business corporation therefore approximates an amount reached by capitalizing the aggregate annual dividends, on a basis of something higher than the usual rate of interest for money loaned, the rate varying, as interest of money loaned varies, with the risk of the investment and the certainty of the annual payments. The annual earnings of a business corporation depend, not on the value of the visible, tangible property of the corporation as a passive investment, like real estate or government bonds or mortgages, but they depend on the good will of the business, its volume, the speed with which the money capital can be turned over, the business skill and experience and economy of its management. The share of stock is property. It is a chose in action, entitling its owner to yearly payments from a corporation, if there are net earnings. But the elements that are united to produce those earnings are not all, or a majority of them, in the form of tangible property, though it may be conceded that they were acquired by investing tangible capital. A corporation does not own its capital stock, divided into shares. It owns the property which, when used in a business with skill and industry, aided by the good will, owned perhaps long before the particular property was ever purchased, will produce the net earnings, out of which the dividends on the stock are to be paid. This is true of all active business corporations, including telegraph companies, just as it is true of individuals in business, that their annual profits are the result, not of their real estate, business plant, and merchandise only, but of those things united with the good will and the skill, experience, and economy used in the conduct of the business. Now, it certainly cannot be said that the annual profits of a dry goods store capitalized on a basis of 6 per cent. would afford any proper guide to the value of the real estate, the merchandise, and the ready capital used in the business. Where the property earns the money as real estate earns

rent, or as money loaned earns interest, the earnings do determine very largely the value of the property; but where, as in a business of an individual or a corporation, the investment is active, instead of passive, there is no necessary relation between the value of the tangible property and the earnings. Would any one claim that the value of the presses, type, press franchises, money capital, and office furniture and other tangible property of a newspaper could be determined by its net earnings, or, if it be a corporation, by the market value of its capital stock? Clearly not. And why? Because nearly all its capital has been expended in securing circulation and advertising patronage, or in other words, good will. This is an extreme example, it is said. Take a bank. There is no business in which the capital invested is kept more nearly in the form in which it was, when invested, than in that of banking, and yet it is well known that the assets of a bank are often much less in value than the profits of the business capitalized at the usual rate of interest. Would the fact that the shares in a banking corporation with a capital stock of \$100,000 were selling at \$150 each on a par value of \$100 be any evidence that the bonds, choses in action, and money and other resources in the vaults of the bank were worth any more than they appear to be on an appraisal without reference to the value of the bank's capital stock? Certainly not. The increase in the value of the bank's capital stock over its resources is due to the good will which invites the confidence of the public in the honesty and prudence of its management, and attracts deposits and business, and to the skill and experience and foresight of its officers in making profitable and safe loans. What is true of a newspaper, a bank, and a dry goods store is equally true of a telegraph company. As averred in the bill, its earnings, and, therefore, the value of its capital stock, is largely dependent on its good will, the honesty, skill, economy, and experience of its management and its employees, added to its property. Its net earning capacity is also affected by business arrangements with railroad companies, and by municipal concessions of the right to use roads

and streets. It seems clear to me that the market value of its capital stock has no necessary or proper relation to the value of the tangible property of the company. If it has, then the earning capacity of a dry goods store should be an element in valuing its capital and merchandise; the profits of a newspaper, in reaching the assessable value of its presses, plant, and ready capital; the profits of a bank, in deciding upon the value of the bonds and bills receivable and money in its vaults.

Now, it is true that the capital stock of a corporation represents, and is a measure of, the tangible and intangible factors of value which unite to earn dividends, and therefore of those factors in which the original capital of the company was invested. The enjoyment of both factors by the owners is protected by the state, and both may, in the absence of any constitutional restriction, be subjected to taxation. The aggregate market value of the shares of stock in the company is as good a measure of their united value for purposes of taxation as it is possible to find. The legislatures of some states have taxed the capital of a corporation, as invested in both the tangible and intangible factors of profits, by reference to the market value of its capital stock. In such states, it is permissible to tax the property of corporations by a different rule from that of individuals, and it is no objection to including in the value of the property or capital of a corporation the good will of the business, even if such an element of earning capacity is not taxed, when enjoyed by individuals. But such is not the rule in Ohio. Article 12, § 2, of the constitution of Ohio declares that "laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise; and also all real and personal property according to its true value in money." In construing this provision the supreme court of the state has decided that:

"Taxing by a uniform rule requires uniformity not only in the rate of taxation, but also uniformity in the mode of the assessment upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden can not exist without uniformity in the mode of assess-

ment, as well as in the rate of taxation. * * * It must be extended to all property subject to taxation, so that all property must be taxed alike equally, which is taxing by a uniform rule." *Bank v. Hines*, 3 Ohio St. 15.

If, therefore, we find that good will and those other intangible factors of the value of the capital stock of a business corporation are neither taxable as property themselves, under the Ohio laws and constitution, nor as an increment to the value of the tangible property of a corporation, or an individual in business, then an Ohio law which requires the value of the capital stock to be a guide in determining the value of the tangible property of a small class of business corporations must be wanting in that uniformity which the constitution enjoins in tax laws, and is therefore void.

It becomes necessary, then, to examine the tax laws of Ohio as they tax the property of other corporations and individuals, with the view to determine whether good will, business skill, economical management, and the other intangible sources of net earnings and factors of stock value are taxed against other corporations and individuals directly, or by increasing the valuation of tangible property. The subjects of taxation as property are mentioned in article 12, § 2, quoted above, as "all moneys, credits, investment in bonds, stock, joint stock companies or otherwise; and also all real and personal property." The legislature defined the meaning of the various terms used in the constitution in section 2730, and with one exception—that of "credits"—we may well assume that the section is a proper construction of the constitution. The section defines real estate to be not only lands and buildings and fixtures, but all rights and privileges belonging or in any wise appertaining thereto. Investments in stock are defined to be all moneys invested in the capital or stock of a corporation the stock of which is or may be divided into shares, transferable by each owner without the consent of the other stockholders, for the taxation of which no special provision is made by law, held by persons residing in this state. Personal property is defined to be every tangible thing which is the subject of ownership, whether animate or inani-

mate, other than money, and not forming part of any parcel of real property as before defined; and the capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, interests in ships and boats, and money loaned on real estate security. Credits are defined to be the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for the labor or service due or to become due to the taxpayer, estimated at its true value in money over and above the legal debts due by him. This definition, as already stated, is not in compliance with the constitution, because it permits a reduction of the sum of legal demands of the taxpayer by the legal debts due from him; but otherwise the constitutionality of the definitions of the section has not been questioned. *Bank v. Hines*, 3 Ohio St. 1. Now, it seems clear that the good will of a business, and the other intangible factors of business earnings, are not included in these definitions of personal or real property, or of the other terms describing the kinds of property to be taxed under the constitution. It would certainly cause a surprise and shock to the business community of Ohio, to have it decided that it is the duty of every business firm and corporation to return for taxation the estimated value of its good will, and the estimated value of the skill and experience and economical management of the employer and employed, or to use such factors of his profits to increase the taxable valuation of his tangible business capital. Section 2731, Rev. St. Ohio, subjects all property as it is described in section 2730, whether belonging to individuals or corporations (except certain exempted property), to taxation. Sections 2734-2738 make provisions for the listing by persons of all their personal property, moneys, credits, and investments in bonds, stocks, and otherwise. Section 2739 prescribes the rules for valuing property of persons as follows:

"In listing personal property it shall be valued at the usual selling price thereof, at the time of listing and at the place where the same may then be; and if there be no usual selling price known to the person whose duty it is to

fix a value thereon, then at such price as it is believed could be obtained therefor, in money, at such time and place; investments in bonds, in stocks, joint stock companies, or otherwise, shall be valued at the true value thereof in money; money whether in possession or on deposit shall be entered in the statement at the full amount thereof, except that depreciated circulating notes shall be entered at their current value; every credit for a certain sum payable either in money, property of any kind, labor or service, shall be valued at the full amount of the sum so payable, except that if it be for a specific article or for a specified number or quantity of any article or articles of property or for a certain amount of labor or services of any kind it shall be valued at the current price of such property or of such labor or service at the place where payable; and annuities or moneys receivable at stated periods, shall be valued at the sum which the person listing the same believes them to be worth in money at the time of listing."

Merchants and manufacturers are required to pay, not upon the stock of merchandise which they have on a certain day in the year, but they are required to average the value of their stock on hand each month of their business, and pay tax on that as personal property. In other respects their returns are like those of other persons. Section 2744 prescribes the ordinary mode of assessing the taxable property of all corporations except banking corporations in the state of Ohio, whether organized in this state or not. It requires their chief officer to list for taxation—

"All the personal property which shall be held to include all such real estate as is necessary to the daily operations of the company, money and credits of such company or corporation, at the actual value in money, in manner following: In all cases return shall be made to the several auditors of the respective counties where such property may be situated, together with a statement of the amount of said property which is situated in each township, village, city, or ward therein. The value of all movable property shall be added to the stationary and fixed property and real estate and apportioned to such wards, cities, villages or townships, pro rata, in proportion to the value of the real estate and fixed property in said ward, city, village, or township, and all property so listed shall be subject to and pay the same taxes as other property listed in such ward, city, village or township."

Section 2740 requires all personal property of every description, moneys and credits, invested in bonds, stocks, joint-stock companies, or otherwise, to be listed in the name of the owner thereof

on the day preceding the second Monday of April in each year, but provides that no person shall be required to list for taxation any share or shares of the capital stock of any company the capital stock of which is taxed in the name of the company. The property of railroad companies is assessed for taxation as a unit. The roadbed, the equipment, the money and choses in action are added together, and the value distributed according to mileage through the counties of the state and between Ohio and adjacent states. Unincorporated banks are taxed on their assets less their liabilities. Incorporated banks are not taxed at all, but their stockholders are taxed, under section 2762, upon their shares on a valuation based on the resources of the bank. It is very manifest from this review of the provisions for assessing the taxable value of the tangible property of individuals and corporations in business that neither the profits of the business nor the good will nor those other intangible factors in the earnings of profits are required to be considered, and it is very certain that they never are considered.

The difference between the taxable value of the property of a corporation and the value of its shares was considered by the supreme court of Ohio in *Insurance Co. v. Ratterman*, 46 Ohio St. 153, 19 N. E. 560. The question in the case was whether shares of stock in a foreign railroad corporation, which paid taxes on a large amount of property in Ohio, but also had much property elsewhere, were returnable for taxation in the hands of their owners. The holders sought exemption under that proviso of section 2746, Rev. St. Ohio, already quoted, which exempts holders of shares of stock from returning them when the corporation pays taxes on its "capital stock" in Ohio. The words "capital stock," as there used, had been construed to mean all, or substantially all, the property of a corporation. The claim of the stockholders was denied. In meeting the argument that to tax the shares in the hands of the stockholders and the property of the corporation, too, was double taxation, Judge Spear, at page 162, 46 Ohio St., and page 560, 19 N. E., in the course of an able opinion, used this language:

"The corporation is the legal owner of all the property of the company, real and personal; and within the powers conferred upon it by its charter, and for which it was created, can deal with the corporate property as a private individual can deal with his own. The interest of the shareholder entitles him to participate in the net profits in proportion to the number of his shares, to have a voice in the selection of officers, to manage the business of the company in like proportion, and, upon its dissolution, the right to his proportion of the property of the corporation that may remain after payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him; is under his sole control, so that he may sell or apothecate it. He is entitled, from net earnings of the corporation, to dividends upon his stock; and the value of the stock depends largely upon its capacity for earning dividends. The shares of stock may be worth much more than the property of the corporation,—that is, the franchise may be very valuable, while the visible capital may be of but little value, and dividends may be greatly out of proportion to the tangible property,—as frequently occurs in regard to street railroads, gas companies, electric light companies, etc. *Farrington v. Tennessee*, 95 U. S., 686, 687; *Watson v. Spratley*, 10 Exch. 236; *People v. Commissioners*, 4 Wall. 244; *Union Bank v. State*, 9 Verg. 490; *Cook v. City of Burlington*, 59 Iowa, 251, 13 N. W. 113. It follows from this that, although the shareholder may be affected as regards the extent of his dividends, by taxation of the property of the corporation, yet a tax on the shares is not a tax on the capital of the company, and e converso a tax on the capital is not a tax on the shares held by the stockholders. Taxation of the capital and property of the corporation, though it be accepted by the state as an equivalent for, is not the same as, a tax on the shares."

In the case of *Miller v. Bank*, 46 Ohio St., 424-428, 21 N. E. 860, Chief Justice Minshall did say:

"A share in the bank is but a fractional part of its capital owned by one who contributed an equivalent part of the capital, or his transferee; and the aggregate of all the shares held by individuals in a bank is equal to the aggregate of its capital. So that, if all the shares in a bank were assessed for taxation in its name, and payment of the tax required of it, the effect would be precisely the same as a tax upon the aggregate capital of the bank."

This statement was true, because, under the law for assessing the value of the shares of the bank, the auditor did not take their market value, but he found the value of each share by adding all the property of the bank and money and other resources together, and dividing by the number of shares. The words quoted have, therefore, no application to the relation of the market value of shares to

the visible capital even in a bank, and still less to that in a trading corporation.

It is clear, for the reasons stated, that the market value of the shares of capital stock in the complainant and other like companies bears no necessary relation or proportion to the value of the tangible property in Ohio or elsewhere; that the market value of the shares depends on elements of value not taxable in Ohio, and not used to determine the value of the taxable property of individuals or other corporations. If so, it seems necessarily to follow that it is prescribing an unconstitutional rule for the valuation of the property of telegraph, telephone and express companies to enjoin upon the appraisers of their property, as the *Nichols* law does, to consider, as an important element increasing the valuation of their property, the value of the aggregate shares of the capital stock of those companies. The bill avers that the amount assessed against the complainant is three times the real value of its property in Ohio. The affidavit of the state auditor shows that the mode of reaching the value of the property of the telegraph company in Ohio was to reduce the total market value of all the shares by the real estate out of Ohio and the stocks and bonds in the treasury of the company, and to take the remainder as the value of the lines of Ohio, reaching that part of that value in Ohio by using the ratio of the mileage of the lines in Ohio to their total mileage. This appraisalment was not an appraisalment of the property of the company in Ohio at all. The board entirely ignored the fact that in this result was included the good will of the company, the valuable and economical arrangements with railroad companies for joint use of lines, the public concessions by which streets and roads are occupied, the skill and experience of the employes, none of which are taxable under the laws of Ohio, but all of which contribute, as the bill avers, in a large degree to the net earnings upon which the market value of the capital stock is based. Tax by such a measure of value is an income tax, and not a property ad valorem tax. It is true that the \$3,000,000, which, by the mode of valuation just described, the board reached as the actual value of the property in Ohio, was

reduced to \$2,000,000, to accord with the unconstitutional and unlawful practice prevailing among assessing officers in this state of valuing not at the true value in money but at two-thirds that value. That reduction, however, does not remove the illegality in such a valuation of the property caused by the assumption that a telegraph company's property in the sense of the Ohio constitution is equal to the market value of its capital stock.

But it is said that I am wrong in construing the Nichols law to require, as an important and controlling element in the valuation of telegraph property, the market value of capital stock of the company, and that it is my duty as a judge to sustain the law if it can be done by construction. For the reasons I have given, I do not think that the market value of the shares of capital stock has any legitimate effect in increasing the value of the tangible and visible property of this telegraph company in Ohio. It does not help the law any, to point out that the market value of the stock is only to be used to determine the true value in money of the company's Ohio property; and that if, in fact, the value of stock should have no effect in the estimate, we must give controlling weight to the words which embody the standard of value fixed by the constitution. The board is enjoined to determine the value of the property to be taxed by using as a guide the value of the capital stock and other rules which shall enable them to fix, not the true value in money of the company's property, but its true value in money in proportion to the entire property of the company as determined by the capital stock and other rules. In other words, it is merely a legislative declaration that the true value in money of the entire property of the company is determined by the entire capital stock of the company and other rules, and the true value in money of the Ohio part is merely a proper proportion of the value of the entire property thus determined. The only construction which would eliminate the error of the law is one which would require the board to ignore the market value of the shares as an element of value. If this were a possible construction (as I think it is not), the result in this case would not be different, for

the present assessment would have to be enjoined as not authorized by law. Certain it is, that courts will not permit injustice to be done to a class of taxpayers by a law which is so worded as to mean one thing to the courts when its validity is attacked, and another thing to the taxing officers when they come to enforce it. Either the law means what the officers construe it to mean, and its validity is to be tested on that construction, or they are to be enjoined from enforcing it except as the courts shall construe it. *Cummings v. Bank*, 101 U. S. 153.

Much stress has been laid on two cases decided by the supreme court of the United States, cited in support of this law. The first—that of *W. U. Tel. Co. v. Attorney General of Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961—was a suit for taxes by the attorney general of Massachusetts against the telegraph company under the general law of the state. By that law all corporations chartered by the state were required to return the market value of the aggregate shares of their capital stock and all their works, structures, real estate, and machinery subject to local taxation without the state. Railroad and telegraph companies were required to return the whole length of their lines, and the length of them without the state. Every corporation was required to pay what in the law is called "a tax upon its corporate franchise at a valuation thereof equal to the aggregate market value of the shares in its capital stock," after deducting in the case of railroad and telegraph companies whose lines extended beyond the limits of the commonwealth such portion of the whole valuation of their capital stock, ascertained as aforesaid, as was proportional to the length of that part of their line lying without the commonwealth, and also an amount equal to the value of their real estate and machinery located and subject to local taxation within the commonwealth, and after deducting in the case of other corporations an amount equal to the value of their real estate and machinery subject to local taxation wherever situated. By another section these provisions were made applicable to a foreign telegraph company. The answer of the telegraph company denied the right of the state to tax its corporate

franchises received from another state, and made its chief defense that such a tax was really a tax upon the franchises received by it from the United States government, by virtue of which it was given the right to occupy all the post roads in the state as an agent of the government and for interstate commerce, and that, even as a tax upon its franchise, it was unfair, because it did not deduct from the market value of its entire capital stock the real estate owned by the company in other states; but there was no averment or evidence to show that the value of the company's property in the state was less than the amount assessed against it. The supreme court gave most of their consideration to the defense founded on the fact that the company was enjoying a franchise from the United States government, holding that, though this prevented the state from excluding the company from post roads, it did not prevent the state from taxing their property. The court upheld the tax as a tax against the corporation on account of the capital owned and used by it in the state of Massachusetts. The discussion is summed up by Mr. Justice Miller as follows (125 U. S. 552, 8 Sup. Ct. 961):

"The tax in the present case, though nominally upon the shares of the capital stock of the company, is, in effect, a tax upon that organization on account of property owned and used by it in the state of Massachusetts; and the proportion of the length of its lines in that state to their entire length throughout the whole country is made the basis for ascertaining the value of that property. We do not think that such a tax is forbidden by the acceptance on the part of the telegraph company of the rights conferred by section 5263, Rev. St., or by the commerce clause of the constitution. It is urged against this tax that in ascertaining the value of the stock no deduction is made on account of the value of real estate and machinery situated and subject to local taxation outside of the commonwealth of Massachusetts. The report of Examiner Fiske, to whom the matter was referred to find the facts, states that the amount of the value of said real estate outside of its jurisdiction was not clearly shown, but it did appear that the cost of land and buildings belonging to the company, and entirely without that state, was over three millions of dollars. In the statement of the treasurer of the company, it is said that the value of the real estate of the company within the state of Massachusetts was nothing. Since the corporation was only taxed for that proportion of its shares of capital stock which was supposed to be taxable in that state, on the

calculation above referred to, and since no real estate of the corporation was owned or taxed within its limits, we do not see why any deduction should be made from the proportion of the capital stock which is taxed by its authorities. But, if it were otherwise, we do not feel called upon to defend all the items and rules by which they arrived at the taxable value on which its ratio of percentage of taxation should be assessed; and, even in this case, which comes from the circuit court, and not from that of the state, we think it should appear that the corporation is injured by some principle or rule of the law not equally applicable to other objects of taxation of like character. Since, therefore, this statute of Massachusetts is intended to govern the taxation of all corporations therein, and doing business within its territory, whether organized under its own laws or those of some other state, and since the principle is one which we cannot pronounce to be an unfair or an unjust one, we do not feel called upon to hold the tax void, because we might have adopted a different system had we been called upon to accomplish the same result. It is very clear to us, when we consider the limited territorial extent of Massachusetts, and the proportion of the length of the lines of this company in that state to its business done therein, with its great population and business activity, that the rule adopted to ascertain the amount of the value of the capital engaged in that business within its boundaries, on which the tax should be assessed, is not unfavorable to the corporation, and that the details of the method by which this was determined have not exceeded the fair range of legislative discretion. We do not think that it follows necessarily or as a fair argument from the facts stated in the case that there was injustice in the assessment for taxation."

The Massachusetts case has no application whatever to the question we are now considering under the state constitution. The question which the court had there to consider was whether the mode of assessing the value of the company's property was unfair in two respects: Was it unfair with respect to the mode of assessment against like property in Massachusetts held by other corporations? Second. Did it include in the valuation against the telegraph company anything not within the taxing jurisdiction of Massachusetts? As to the first question, the court found that by general law the state taxed all corporations on the difference between the assessed value of the tangible property subject to local taxation and the market value of the shares of the capital stock. This, though in name a tax on the franchise, was held to be a tax on the capital of the corporation used in its business.

The property, as thus valued, of course included the element of the good will in Massachusetts, the skill and economy of the local management, and local franchises which the money capital of the corporation had been invested to secure. The elements of value were all within the taxing jurisdiction of Massachusetts, and, as they were taxed as capital against the corporations of Massachusetts, there was no reason why they should not be taxed as such against foreign corporations whose enjoyment of the same things of value were protected by the law of the state.

The question in the case at bar is whether the mode of valuing complainant's property under the Nichols law is within the meaning of article 12, § 2, of the Ohio constitution, according to its true value in money, and uniform with the valuation of other property taxed in the state. I have tried to show that the valuation for taxation of property used in business in Ohio by including as an element of its value the good will of the business, and the other things, not property, which unite to earn profits, is not the mode prescribed for the valuation of any property except that of the companies covered by the Nichols law, and is presumably, therefore, not a method of assessing according to its true value in money as enjoined by the Ohio constitution. In the case of *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 11 Sup. Ct. 876, the tax which was disputed was in terms a tax upon the capital stock of the company, which owned 100 cars or more, passing constantly into, through, and out of the state of Pennsylvania. The amount of the tax was determined by taking that proportion of the entire capital stock of the company which the number of miles operated by its cars in Pennsylvania bore to the total mileage operated by the company. The court below sustained the tax as levied upon that part of the capital stock invested and used in Pennsylvania. No complaint was made by the company that the amount taxed exceeded the value of the company's capital invested in property which was at times within the taxing jurisdiction of Pennsylvania. The sole question was whether the tax based on the mileage of

the cars which were engaged in interstate commerce was not a tax on interstate commerce. The discussion was as to the situs of the cars. There is no constitutional limitation in Pennsylvania as there is in Ohio, which requires the property of corporations to be taxed in the same way as that of individuals, and which prevents the valuation of their taxable property on a different scale from that of individuals. The Pennsylvania case is quite as inapplicable to the case at bar as the Massachusetts case, and for the same reasons.

A strong argument has been made to show that the companies embraced within the Nichols law are of a peculiar class, and that, therefore, special rules for the assessment of their property are not a departure from true uniformity in taxation. The case of *Express Co. v. Seibert*, 142 U. S. 339, 12 Sup. Ct. 250, is cited to this point. In that case the question was whether a tax upon the gross receipts of an express company was violative of section 3, art 10, of the constitution of Missouri, which required taxes levied to be "uniform upon the same class of subjects within the territorial limits of the authority levying the tax," when such a tax was not imposed on railroad companies. It was held that there was no lack of uniformity in the discrimination between the two classes of corporations because of the inherent difference in the manner of conducting their business. Mr. Justice Lamar, speaking for the court, said on page 351, 142 U. S., and page 250, 12 Sup. Ct.:

"This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation, and of a just adaptation of property to its burdens."

That this is true as to an economic principle, and that it is equally true in considering the question whether the enforcement of a tax against any property by a state is the denial of the equal protection of the laws secured by the four-

teenth amendment to the federal constitution, must, of course, be conceded; but that it is true as constitutional law in Ohio must be denied. The constitution of Ohio does impose the same tax on every species of property, as therein defined, according to its true value in money. The constitution of Missouri permitted the classification of property and diversity of taxation on the different classes. The Ohio constitution does not. Speaking of the differences between railroad and steamboat companies and express companies, Mr. Justice Lamar said, in the same case:

"The vital distinction is this: Railroad companies pay taxes on their roadbeds, rolling stock, and other tangible property, as well as generally upon their franchise; and steamboat companies likewise pay tax on their tangible property. This tax is not necessarily an *ad valorem* tax at the same rate as is paid on other private property in the state belonging to individuals. Generally, indeed, it is not, but is often determined by other means, and at different rates, according to the will of the legislature. *Kentucky Railroad Tax Cases*, 115 U. S. 321-337, 6 Sup. Ct. 57. On the other hand, express companies such as are defined by this act have no tangible property of any consequence subject to taxation under the general laws. There is, therefore, no way by which they can be taxed at all, unless by a tax upon their receipts from business as transacted."

No one can read this passage without seeing that the learned justice was dealing with a state constitution very different from that of Ohio. It is true that a tax on gross receipts of a foreign telegraph company has been sustained in Ohio (*Telegraph Co. v. Mayer*, 28 Ohio St. 521), not as a tax on property, but as a tax on a franchise, which is not property in Ohio (*Bank v. Hines*, 3 Ohio St. 1). Whenever property is taxed in the latter state, whether it be the property of a railroad, a steamboat, or an express company, it must pay the same tax according to its true value in money. It needs no argument to establish that telegraph companies, express companies, and telephone companies conduct a business yielding very large profits in proportion to the tangible property owned by them, and that the protection which they enjoy from the government of the state requires and justifies the imposition of taxes upon them greatly in excess of the general rate per cent. on their taxable property assessed at its

true value in money, as required by article 12, § 2, of the constitution of Ohio; but it does not justify the fictitious valuation of their property for taxation in violation of that section. The inequality must be remedied by taxes based on something other than property, and this brings us to another argument on behalf of defendants.

It is said that if the tax imposed by the Nichols law cannot be supported as a property tax it may be supported as a tax upon the franchise of the corporation to do business as such in Ohio, or as a tax upon its business in the state. The question of the power of the legislature of Ohio, under its constitution, to tax franchises or business has been much mooted, and in the language of some of the earlier decisions the power was expressly or impliedly denied, but an examination of the later decisions of that court seems to me to leave no doubt that by a proper construction of the constitution such power is vested in the general assembly. Article 2, § 1, of the constitution provides that the legislative power of this state shall be vested in a general assembly, which shall consist of a senate and house of representatives. By this section it has been held that the taxing power was conferred on the general assembly, subject to such limitations as are thereafter imposed in the constitution. Article 12, § 2, enjoins the legislature to pass laws taxing by a uniform law all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property. The effect of this is only to limit the character of the law which the legislature may pass when taxing that which is property within the terms used in that article. It has no effect to limit the character of a law passed to tax business or franchises, nor does it take away the power to tax them conferred by the general grant of legislative power. In *Telegraph Co. v. Mayer*, 28 Ohio St. 533, a tax upon the gross receipts of the complainant company was sustained as a tax upon the privilege it enjoyed of doing business and exercising its corporate franchise within the state. This decision has never been reversed or questioned as far as the state question is concerned, and fully establishes the right

contended for by counsel for the state. See, also, *Baker v. Cincinnati*, 11 Ohio St. 540, 543; *Adler v. Whitbeck*, 44 Ohio St. 585, 9 N. E. 672; *Anderson v. Brewster*, 44 Ohio St. 585, 9 N. E. 683; *Marmet v. State*, 45 Ohio St. 68, 12 N. E. 463; *State v. Reinmund*, 45 Ohio St. 214-218, 13 N. E. 30; *Ashley v. Ryan*, 49 Ohio St. 504, 31 N. E. 721.

While, therefore, the power of the legislature to tax the privilege of the telegraph company to exercise its corporate franchise in Ohio must be conceded, I cannot see how it is possible to construe and enforce the Nichols law as one taxing the franchise or the business of the company, or as one taxing the property and franchise and business of the company all together, because the law fixes no definite mode of ascertaining the amount of tax to be imposed for franchise and business, but leaves the amount above the intrinsic value of the property to be fixed at the discretion of the board of appraisers. It may be conceded that strict uniformity in a franchise or business tax as to different classes of corporations is not necessary, because the power is not controlled by article 12, § 2; yet it is certain that the legislature cannot delegate to a board of appraisers to determine how much shall be imposed on any corporation or class of corporations as a franchise or business tax. Had this law fixed exactly the amount of tax to be paid, by fixing the value to be assessed as a certain proportion of the capital stock, it could not, as I have attempted to show, be held valid as a property tax; but it would be a question whether it might not be supported, under the state constitution, as a property and franchise tax together (see suggestion by Judge Johnson in *Telegraph Co. v. Mayer*, 28 Ohio St. 531-540), or as a franchise tax only. In the *Mayer* case, the amount of the tax was certainly fixed by the gross receipts and the rate per cent. of property tax in each county. But here the board is enjoined to value property, and consider as an element in the value of it that which has no necessary relation to its value as such, and which, in view of laws taxing other property, cannot constitutionally affect its taxable value. What weight shall be given to this element, is left to the

board. To uphold the law as a tax on a franchise or business would be, therefore, to commit to the discretion of the board, the amount which should be paid as tax for such franchise or business. This would be a delegation of legislative power to executive officers, not permissible under the constitution. *Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton Co.*, 1 Ohio St. 77-87.

I have reached the conclusion that this law is unconstitutional with great reluctance, and only after much consideration of it, fully realizing the duty of a court to sustain a law if it can be done, particularly under the circumstances of this case. It is exceedingly embarrassing for a federal court to pass upon the validity of a state law, under a state constitution, in advance of the supreme court of the state, which is the ultimate tribunal on all such questions. *Pelton v. Bank*, 101 U. S. 143, 144. For this reason, I ordered a reargument of the case. If I could avoid passing on the question before the state supreme court shall have passed on it, with a due sense of my judicial obligation to litigants who, under the constitution and laws of the United States, have the right to invoke my judgment, I would gladly do so; but I have now held the case since December last, when the first argument was made, and since March 23d, when the second argument was made, and I think I ought not to delay longer when pressed by counsel for a decision. I ought to add that if the case could have been made to turn on a question under the federal constitution, I should have passed the state question without deciding it; but this was impossible. As, in my opinion, the law is invalid for the reasons given, it is unnecessary to consider the federal questions raised.

One thing more remains to be said, and that is, in regard to the payment of taxes by the complainant. If the part of the Nichols law prescribing the mode of valuation is to be held invalid, then the whole law must be held invalid, because it is manifest that it was the invalid parts which induced the passage of the other provisions. The whole system constructed in the Nichols law revolves around that as its prominent feature. With the law, must go the clause repealing old

section 2778, for it is certain that the repealing clause would not have been passed, had the legislature anticipated a judicial declaration of the invalidity of section 2778a. The result is that section 2778 of the Revised Statutes is now in force, and the complainant ought to pay its taxes thereunder. It has, as the amendment to the bill and affidavits show, paid taxes on its real and personal property in Ohio, but not the taxes due under section 2778. Until this is done, it is not entitled to equitable relief. Unamended section 2778 prescribes that the telegraph company shall pay at the same rate per cent. as the tax on property in each county, upon the gross receipts in the county from business done within the state. In counties where the tax under the Nicholls law exceeds that under old section 2778, the preliminary injunction prayed for will be granted on condition that the taxes due therein under old 2778 are paid within 10 days from the filing of this opinion. In counties where the taxes to be paid under old 2778 exceed those due under the Nichols law,—which must be the case in two or three counties with large cities,—the complainant cannot be injured, even if the certificate of the board of appraisers goes down to the auditor, and the tax is collected; for, if the Nichols law is invalid, the company must there pay more taxes than those certified. As to the certificates to such counties, the board will not be enjoined. Counsel can doubtless agree in respect to which counties certificates should not be enjoined, and prepare the order of injunction accordingly. If within 10 days the additional taxes have been paid in counties to be affected by the injunction thus drawn, and another amendment to the bill, with affidavit, is filed, showing such payment, the demurrer to the amended bill will be overruled; otherwise the bill will be dismissed.

An untutored deaf mute is held in the South Carolina case of *State v. Weldon*, 24 L. R. A. 126, to be competent to testify as a witness by signs, through an interpreter who is not an expert, but who can correctly interpret the communications. The authorities, old and new, on the subject of deaf and dumb persons as witnesses, are presented in the annotations to the case.

Supreme Court of Ohio.

WINEMILLER V. LAUGHLIN ET AL.

Constructive service—When conclusive in collateral attack—Foreclosure of mortgage—Sufficiency of petition, to support demand against other lienholders.

Where in an action brought to foreclose a mortgage an affidavit in due form to obtain service, by publication, is filed and publication had, a finding by the court of common pleas that the publication "is in all respects regular and according to law," and that the defendant has been "duly served with notice of the pendency of said cause of action," is conclusive against such defendant in a collateral attack upon the judgment, even if he had no actual notice of the proceedings, resided within the state and might have been personally served with summons, and although it does not appear of record that after the publication was made and before the hearing an affidavit was filed stating that the residence of such defendant was unknown and cannot with reasonable diligence be ascertained," as is prescribed by section 3048, Revised Statutes.

2. The plaintiff in an action to foreclose a mortgage is not required to set forth either the nature of the facts constituting the claim of another lienholder, in order to bar the latter by a decree against his claim if he should fail to answer. If for that purpose anything more is required than to make him a party and serve him with legal process, it will be sufficient for the petition to state that such defendant claims some interest in the mortgaged premises and advises him that his claim or lien will be barred if fails to appear and disclose it.

(Decided June 19, 1891.)

ERROR to the Circuit Court of Paulding county.

On October 8, 1883, The Collins Manufacturing Company, a body corporate then owning the land which is the subject of controversy in this action, executed a mortgage thereon to Clara A. Hoover, to secure the payment of a promissory note for \$1,000, due the 1st of the ensuing October. The Collins Manufacturing Company, before September 5, 1885, conveyed the premises to one J. W. Vogelsong, the foregoing mortgage still subsisting afterwards, on September 5, 1885, said Vogelsong executed and delivered to Mary B. Laughlin defendant in error, a mortgage on said premises to secure the payment of \$1,350.00 due in five years from date and on November 2, A. D. 1885, he executed and delivered to her another mortgage thereon to secure the payment of \$1,000.00 due, also, in five years.

On November 29, 1890, Clara A. Hoover, the mortgagee of The Collins Manufacturing Company, as aforesaid, began a suit in Paulding county, where the land lay, to foreclose her mortgage, making among others, J. W. Vogelsong, the purchaser of the premises, and said Mary B. Laughlin, his mortgagee, parties to the action. Mary B. Laughlin being served by publication only, and having no ad-

tice, in fact, that the action was pending, did not appear and set up her claim, whereupon a decree was entered ordering a sale of the premises to satisfy the mortgage of Clara A. Hoover. She, becoming the purchaser thereof at the sale made under the decree, had the sale confirmed and her title quieted against any claim, among others, of said Mary B. Laughlin.

Afterwards, Clara A. Hoover, the purchaser, sold and conveyed, by a deed in fee simple, the premises to said J. W. Vogel song, and by similar conveyances the title became lodged in the plaintiff in error, Elger F. Winemiller. Thereupon Mary B. Laughlin, defendant in error, commenced an action in the Court of Common Pleas of Paulding county to foreclose the mortgages made to her, which have been mentioned before, making, among others, J. W. Vogel song, her mortgagor, and Winemiller to whom the premises had been conveyed, parties defendant.

Winemiller answered setting up the record of the action before mentioned, brought by Clara A. Hoover, showing the decree for the sale of the premises, the sale to Clara A. Hoover, its confirmation and the decree quieting the title of the purchaser, against the claim of Mary B. Laughlin, and the several mesne conveyances to himself, by virtue of which he contends he has succeeded, and becomes subrogated to all the rights, which by virtue of said decree and sale became vested in said Clara A. Hoover.

To this answer Mary B. Laughlin interposed the following reply:

"Plaintiff for her reply to the amended answer of Elger F. Winemiller says that she denies that said Clara A. Hoover, in said cause, No. 3,482, in her petition prayed that said Mary B. Laughlin be required to answer and set up her interest in or lien upon said premises, if any she had, or be forever barred.

"Said Mary B. Laughlin denies that she had due and legal or any notice of the pendency of said action or that any day was named in said notice on which she was required to answer, as will appear from the certified copy of the record attached to said amended answer.

"Plaintiff admits that Clara A. Hoover was the purchaser at said sheriff's sale

and that she conveyed the land in question to John W. Vogel song and avers that the consideration named in said deed was twenty-five hundred dollars.

"She further admits that said John W. Vogel song conveyed said premises to Edwin B. Hale, who conveyed to Henry E. Spring, who conveyed to said defendant, Elger F. Winemiller, as in his said amended answers contained.

"Plaintiff denies that the defendant, Elger F. Winemiller succeeded and become subrogated to the rights of Clara A. Hoover in said premises.

"Plaintiff further avers that the pleadings, record and proceedings in said cause, No. 3,482, were not sufficient to warrant any judgment or order as to her, and that the court was without jurisdiction of her person.

"Plaintiff avers that she had no actual notice whatever of the pendency and prayer of said petition in said cause, No. 3,482, until informed by her attorneys about the time of the filing of the petition herein.

"That for more than seven years last past, she has been a resident of the county of Erie, in the state of Ohio.

"That the affidavit set forth in said proceedings was wholly false.

"Plaintiff further avers that at the time of the execution and delivery of the mortgage set forth in her petition, the defendants, John W. Vogel song and Emma O. Vogel song, by their said mortgages duly executed and acknowledged covenanted with said plaintiff as follows:

"And we, the said grantors do for ourselves and our heirs, executors and administrators covenant with the said grantee, her heirs and assigns, that at and until the unsealing of these presents, we were well seized of the above described premises as a good and indefeasible estate in fee simple, and have good right to bargain and sell the same in manner and form as above written, that the same are free and clear from all incumbrances whatsoever, and that we will warrant and defend said premises with the appurtenances thereunto belonging to the said grantee, her heirs and assigns forever, against all lawful claims and demands whatsoever."

"The said Clara A. Hoover, the purchaser at said sheriff's sale, for the con-

sideration of the sum of twenty-five hundred dollars, conveyed said premises to John W. Vogelsong on the 25th day of April, 1887, through whom the said defendant, Elger F. Winemiller, claims title and the said Collins Manufacturing Company, subsequent to the date of its mortgage to said Clara A. Hoover, but prior to the date of plaintiff's mortgage and the beginning of said cause, No. 3,482, by its deed of general warranty, duly executed, acknowledged and delivered, conveyed said premises in the petition described to John W. Vogelsong."

In the court of common pleas a demurrer was interposed to this reply and sustained. The cause was then taken by appeal to the circuit court, where, upon a demurrer being again interposed to the reply, the latter court held the answer to be insufficient, and rendered judgment for the plaintiff below, now defendant in error. Thereupon the plaintiff in error began the present proceedings to obtain a reversal of the judgment of the circuit court.

Sylvester Price, for plaintiff in error.

McMillen & Phipps, Snook & Snook, Holland & Lauch, for defendant in error.

BRADBURY, J.

The only question for consideration presented by the record is whether Mary B. Laughlin, defendant in error, is bound by the proceedings in the action brought by Clara A. Hoover to foreclose the mortgage of the latter. Her counsel contend that she is not bound, for two reasons: First, because she was not legally notified of the pendency of the action; second, if she was legally notified, the averments of the petition were not sufficient to require her to answer and set forth a claim under her mortgage, and that, therefore, a clause in the order of confirmation quieting the title of the purchaser against her mortgage was void.

That the defendant in error was a resident of this state and might have been notified, by a summons served upon her personally, of the pendency of the action, the decree in which is now set up to estop her, and that she had no actual knowledge of its pendency is admitted. She had, however, constructive notice by publication, unless the published no-

tice was too defective in its context or in the steps taken to authorize and perfect it to charge her constructively.

The notice was in these words:

"Henry L. Custer, J. M. Custer and Mary B. Laughlin, whose place of residence are to the undersigned unknown, will take notice that Clara A. Hoover, on the 20th day of May, A. D. 1886, filed her petition in the Court of Common Pleas, of the county of Paulding and state of Ohio, alleging, among other things, that J. W. Vogelsong executed and delivered to her his certain promissory note calling for \$1,000.00 and to secure the payment thereof he had executed and delivered to said Clara A. Hoover a mortgage upon certain real estate therein described and that said claim is unpaid, and praying for a judgment and foreclosure of said mortgage, and alleging that the aforesaid Henry L. Custer, J. M. Custer and Mary B. Laughlin claim a lien upon the premises in said mortgage described.

"Said cause will be for hearing on the 3d of January, A. D. 1887, and unless the above named, and each of them come into court and set forth their said respective claims they will be barred therefrom."

The notice states that the mortgage sought to be foreclosed, and the note secured by it were executed by J. W. Vogelsong, whereas, the fact was, and the petition so averred, that they were executed by the Collins Manufacturing Company, which was the grantor of Vogelsong, and Vogelsong was the mortgagor of defendant in error. This publication was an attempt to notify her of the pendency of the action; it fairly disclosed that the plaintiff in that action sought to foreclose a mortgage on premises upon which he claimed a lien and advised her that her claim would be barred unless she appeared and set it forth. An affidavit was filed, regular in form, as prescribed by the statute, as preliminary to service by publication. Section 5048, Revised Statutes, provides that where the residence of the party served by publication is unknown, an affidavit stating that fact shall be made before the hearing. Whether or not such an affidavit was made does not appear from the record. Nor do we find it

necessary to determine whether where the preliminary affidavit, as in this case, shows that the residence of the party to be served by publication is unknown, a second affidavit, to that effect, made after the publication and before the cause is heard, is necessary to give jurisdiction to the court, for the court of common pleas is one of general jurisdiction competent to determine questions relating to that jurisdiction, and it expressly found that the defendant here had been "duly served with notice of the pendency of said cause of action and the prayer of the plaintiff's petition;" and if such an affidavit was necessary to authorize the finding, we should presume in a collateral proceeding like this that it was made. *Richards v. Skiff*, 8 Ohio St. 586.

We need not pause to consider the sufficiency of this notice, or whether the finding above quoted would have bound her, had she instituted proceedings in error directly on the judgment to test their soundness; or if she had brought an independent proceeding to attack the judgment directly, for she did neither, but instead chose to assail it in a collateral proceeding as having, against her, no binding force whatever. The policy of the law is to maintain the stability of judicial determinations against this mode of attack, and, that universal principles of natural justice may not make this mode necessary, the rules of law provide the methods above mentioned for the correction of irregularities that are not sufficient to render a judgment, upon its face, a nullity. Of course a judgment that is void may be disregarded whenever and wherever it may be met. The irregularities in the service by publication, however, disclosed by the record under consideration, do not, we think, render the judgment void against the defendant in error, and open to collateral attack by her in the face of a finding by the court of common pleas, a court having capacity to determine, in the first instance its own jurisdiction, that she had been legally served by publication. If an additional affidavit, as prescribed by section 5048, of the Revised Statutes, was necessary to support such finding, and complete the jurisdiction, we, as before stated, should presume that it was made. *Lessee of Fowler v. Whitman*, 2

Ohio St. 271; *Buchanan v. Roy's Lessee*, 2 Ohio St. 251; *Richards v. Skiff*, 8 Ohio St. 586.

2. The petition of Clara A. Hoover sets forth a claim upon a mortgage, and without attempting to disclose the nature of the claim held by the defendant in error, or to state facts which would constitute any claim whatever, proceeded to state that she, defendant in error, and certain other defendants, naming them, "have or claim to have some interest in or lien upon said premises, the amount and nature of the same is not fully known to said plaintiff, and she avers that they should be served in this action with summons and come in and set up their interest in said premises or be forever barred of the same."

Certainly under section 5006, Revised Statutes, Mary B. Laughlin was a proper party to the action brought by Clara A. Hoover on her mortgage, for the former held a mortgage on the premises against which the latter was proceeding; and if the purchaser at a sale made under such proceedings was to secure title free from her lien, then Mary B. Laughlin was a necessary party.

Being at any rate a proper party to the action, she ought, upon principles of well nigh universal application in such cases, to be bound by the judgment rendered in it unless the petition imposed no duty upon her to answer and set forth her claim.

Unless the plaintiff in an action brought to foreclose a mortgage, in order to bar the lien or claim of another in the mortgaged premises by a decree taken *pro confesso* upon a failure to answer, is bound either to state the facts that constitute such lien or claim, or disclose its nature so that the claimant could identify and recognize it, we do not perceive what more should have been required of Clara A. Hoover in the action, the record of which we are now considering. The petition contained a pertinent description of the premises, and as the portions of it quoted before show, informed Mary B. Laughlin that if she had any lien thereon she was required to set it forth on pain of having it barred if she failed to comply. This we hold to be sufficient to require her to appear and set forth her claim, and if she fails to com-

ply, will authorize a decree against her in respect to its validity. Our Code of Civil Procedure simply requires of a plaintiff that he set forth his own cause of action, section 5060, Revised Statutes; while section 5006, before referred to, authorizes him to make any person a defendant to an action "who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of a question involved therein." Whether, in view of the simplicity of procedure which it is the object of the code to secure, anything more should be required of a plaintiff in an action to foreclose a mortgage, to compel lien holders to come in and set forth their respective claims upon the property in controversy than to merely make them parties and serve them with process, is a question that may admit of considerable doubt, but its determination here is not necessary.

Judgment reversed.

(To appear in 51 Ohio St.)

SUPREME COURT PROCEEDINGS.

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General Docket.

8879. The Andrews Brothers Company v. J. Edgar Rudge, Adm'r of Michael Majornik. Error to the Circuit Court of Mahoning Co. Judgment affirmed.

3883. Cora Cook as Adm'x, etc., v. The Columbus, Hocking Valley & Toledo Ry. Co. Error to the Circuit Court of Athens county. Judgment affirmed.

3920. William Monypeny v. Joseph Metz. Error to the Circuit Court of Franklin county. Judgment affirmed.

3976. New York, Chicago & St. Louis Ry. Co. v. John C. Koehchley. Error to the Circuit Court of Huron county. Judgment affirmed.

Motion Docket.

2213. The Cleveland Leader Printing Co. v. Arnold Green. Motion by defendant to dismiss cause No. 2831 on the General Docket. Motion allowed. Minshall J. and Dickman C. J. dissent.

2233. Eliza Heaton, etc., v. John N. Eldridge et al. Motion by plaintiff to extend time for filing printed record in cause No. 4096, on the General Docket. Leave to file printed record granted. Record filed.

2242. The Ohio Thresher and Engine Co. v. Jacob H. Anspach. Motion by defendant to advance cause No. 3953 on the General Docket. Motion allowed.

2243. Frederick Josse v. Valentine Decker. Motion by defendant to strike petition in error from files and dismiss cause No. 3981 on the General Docket. Motion overruled.

2244. Ernest Attschul v. The State of Ohio. Motion for leave to file a petition in error to the Circuit Court of Cuyahoga county. Motion withdrawn.

2245. The State of Ohio v. William R. Johnson. Motion for leave to file a bill of exception to the Common Pleas Court of Jefferson county. Motion allowed.

2246. Balfour Snyder et al. v. The Chamber of Commerce of Findlay, Ohio, et al. Motion by defendant for leave to file answer in cause No. 2694 on the General Docket. Motion allowed. Leave to plaintiff in error to plead to answer in thirty days from October 4, 1894.

2247. John Montgomery et al. v. George S. Clark. Motion by defendant to advance cause No. 4175 on the General Docket. Motion allowed.

2249. The City of Youngstown, Ohio, et al. v. Myron E. Dennison. Motion by plaintiff to advance cause No. 3936 on the General Docket. Motion allowed.

2250. The Cincinnati Street Ry. Co. v. Anthony Schwarz, Adm'r, etc. Motion by plaintiff for stay of execution in cause No. 4107 on the General Docket. Motion allowed.

2251. John T. Crabbs v. Smith & Ozier et al. Motion by plaintiff to reinstate cause No. 4055 on the General Docket. Motion allowed by consent of parties.

2252. Francis L. S. Darby v. The State of Ohio ex rel. Myron T. Palmer. Motion by plaintiff for stay of execution in cause No. 4116 on the General Docket. Motion allowed.

2253. The State of Ohio ex rel. A. C. Reason v. Henry C. Jacobi, sheriff of Huron county, Ohio. Motion for a writ of mandamus. Motion allowed. Issue of alternative writ waived; answer to be filed on or before October 3, 1894; cause to be heard October 13, 1894.

2254. Francis L. S. Darby v. The State of Ohio ex rel. Myron T. Palmer. Motion by plaintiff to advance cause No. 4116 on the General Docket. Motion allowed. To be heard October 13, 1894.

2255. The State of Ohio ex rel. A. C. Reason v. Henry C. Jacobi, sheriff of Huron county, Ohio. Motion by the Relator to advance cause No. 4222 on the General Docket. Motion allowed.

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